




Texas Water Development Board

P.O. Box 13231, 1700 N. Congress Ave.
Austin, TX 78711-3231, www.twdb.texas.gov
Phone (512) 463-7847, Fax (512) 475-2053

TO: Board Members

THROUGH: Kevin Patteson, Executive Administrator 
Les Trobman, General Counsel 

FROM: Todd Chenoweth, Senior Advisor 

DATE: October 17, 2014

SUBJECT: Proposed Rulemaking
31 TAC Chapter 363, Financial Assistance Programs
31 TAC §353.3, Board Meetings
31 TAC §356.10, Definitions
31 TAC §367.2, Definitions

ACTION REQUESTED

Authorize the adoption and publication of amendments to 31 Texas Administrative Code (TAC) Chapter 363 relating to Financial Assistance Programs, 31 TAC §353.3 relating to Board Meetings, 31 TAC §356.10 of Subchapter A relating to Definitions, and 31 TAC §367.2 relating to Definitions, along with the addition of Subchapter M to 31 TAC Chapter 363 relating to the State Water Implementation Fund for Texas (SWIFT) and the State Water Implementation Revenue Fund for Texas (SWIRFT).

BACKGROUND

House Bill 4, together with Senate Joint Resolution 1, passed by the 83rd Texas Legislature, created the SWIFT and the SWIRFT to help finance projects in the state water plan and to provide ongoing state financial assistance for water supplies. In accordance with Texas Water Code §15.439, the board is required to adopt rules that provide for the use of funds in the SWIFT/SWIRFT; that establish standards for determining whether projects meet the criteria for rural political subdivisions, agricultural water conservation or water conservation and reuse; and that specify the board's criteria for prioritization of projects. Pursuant to Texas Water Code §6.101, the board also has the authority to adopt rules it deems necessary to carry out its powers and duties.

Our Mission

To provide leadership, information, education, and support for planning, financial assistance, and outreach for the conservation and responsible development of water for Texas

Board Members

Carlos Rubinstein, Chairman | Bech Bruun, Member | Kathleen Jackson, Member

Kevin Patteson, Executive Administrator

KEY ISSUES

Recommended Amendments to 31 TAC Chapter 363, Subchapter A (relating to General Provisions).

The recommended amendment to §363.1 (relating to Scope of Subchapter) adds the State Water Implementation Fund for Texas and the State Water Implementation Revenue Fund for Texas to the list of financial assistance programs covered by Chapter 363. The change is required because the board is implementing these new financial assistance programs by adding a Subchapter M to Chapter 363.

The recommended amendment to §363.2 (relating to Definitions of Terms) adds the acronym SWIFT for the State Water Implementation Fund for Texas and the acronym SWIRFT for the State Water Implementation Revenue Fund for Texas to the definitions used in Chapter 363 in order to have a convenient way to refer to these programs throughout the Chapter.

The recommended amendment to §363.33 (relating to Interest Rates for Loans and Purchase of Board's Interest in State Participation and Board Participation Projects) adds loans from the SWIRFT to the list of loan financial programs for which the board will establish lending rate scales, in order to cover the new financial program established by HB 4.

The recommended amendments to §363.51 (relating to Inspection during Construction) adds the phrase "provisions for environmental mitigative measures," in order to be consistent with §363.731. The requirement that the project engineer give assurance that the project is constructed in accordance with sound engineering principles is deleted for consistency with Texas Water Code §§17.183(a)(5)(C), 17.185(a), and 17.187. The recommended section also adds the requirement that the political subdivision or nonprofit water supply corporation must take corrective action on a project as necessary to complete the project in accordance with the approved plans and specifications, in order to be consistent with §363.731, (relating to Inspection During Construction).

The recommended amendments to §363.731 (relating to Inspection During Construction) delete the requirement that the project engineer give assurance that the project is constructed in accordance with sound engineering principles for consistency with Texas Water Code §§17.183(a)(5)(C), 17.185(a), and 17.187.

The recommended amendment to §363.951 (relating to Construction Contract Requirements) adds the requirement that the executive administrator certifies that work on construction of a project has been completed in accordance with the approved plans and specifications, as well as deleting the requirement that the certification include that the work was done in accordance with sound engineering principles and practices, in order to implement Texas Water Code §17.183(a)(5)(C).

The recommended amendment to §363.953 (relating to Inspection of Projects) deletes the requirement that the project engineer give assurance that the project is constructed in accordance with sound engineering principles for consistency with Texas Water Code §§17.183(a)(5)(C), 17.185(a), and 17.187.

The recommended amendments to §363.955 (relating to Certificate of Approval) adds the words, "and specifications," and deletes "sound engineering principles," in order to implement Texas Water Code §17.187.

Recommended Amendment to 31 TAC Chapter 363 by addition of a New Subchapter M (relating to State Water Implementation Fund for Texas and State Water Implementation Revenue Fund for Texas).

New §363.1301 (relating to Scope of Subchapter M) is recommended to specify the scope and coverage of the Subchapter M. Subchapter M governs the board's new financial program to provide loans to political subdivisions and nonprofit water supply corporations to finance water management strategies in the state water plan. Subchapter A of Chapter 363 will also apply to the program except to the extent there is a conflict with Subchapter M, in which case Subchapter M will apply.

New §363.1302 (relating to Definition of Terms) is recommended to provide definitions of terms used throughout Subchapter M.

The recommended definition of "Agricultural water conservation" is defined by referring to the board's existing Agricultural Water Conservation Program. Those types of projects covered by the Agricultural Water Conservation Program would also be eligible for funding under the SWIFT and SWIRFT loan program if it were otherwise qualified, e.g. the project was a water management strategy in the state water plan.

The recommended definition of "Agricultural irrigation project" includes projects on agricultural lands that improve water delivery or application efficiency. The recommended definition would allow for new water sources such as a new well, as part of an agricultural irrigation project. Also included in the recommended definition are projects for new irrigation systems. Finally, the recommended definition would also cover meters.

The recommended rules define "Alternate facility," "Excess capacity," and "Existing needs," consistent with the use of those terms for the board's existing state participation program, 31 TAC §§363.1001 - 363.1017.

The recommended rule defines "Historically Underutilized Business" consistent with the definition in Texas Water Code §15.431, which references §2161.001, Government Code, and the implementing regulations of that section.

The recommended rule would define "Reuse" as the beneficial use of groundwater or surface water that has already been beneficially used because this is the definition used in the state water plan and the second use of water is required to be beneficially used as well as the first. *See: Water for Texas 2012, pages 170 and 249.* This definition would include both direct reuse, where water that has been used once is treated and then reused, and indirect reuse where the once used water is treated, discharged to a surface water body or injected into an aquifer, and then retrieved at a later time.

The recommended rule would define "Rural" as required by Texas Water Code §15.434(b)(1)(A), which is to use the definition of "rural political subdivisions" found in Texas Water Code §15.992. The recommended rule uses that definition but further specifies that the board will use the most current data available from the U.S. Bureau of the Census or board-approved projections for the population figures.

The recommended rule would define "Water conservation" consistent with the definition in the state's best management practices guide for water conservation, first developed by the Water Conservation Implementation Task Force in 2004 and since maintained by the Texas Water Development Board pursuant to Texas Water Code Chapter 10, except that the phrase, "or increase the recycling and reuse of water" used in the best management practices guide is deleted from the definition. Texas Water Code §15.434(b)(2) uses "water conservation" and "reuse" as mutually exclusive terms. In light of this statutory language, the board's recommended rule continues the distinction.

The recommended rule defines "Water plan project" in a manner consistent with the use of the term in the state water plan and common usage among water professionals dealing with water resources planning in Texas.

The recommended rule defines "Water supply need" in a manner consistent with the use of the term in the state water plan and common usage among water professionals dealing with water resources planning in Texas, and consistent with the use of the concept in Texas Water Code, § 16.053.

Recommended §363.1303 (relating to the Prioritization System) provides a prioritization system required by Texas Water Code §15.437. The processing of applications and the steps in the recommended prioritization system is similar to the functioning of the prioritization system for the current Water Infrastructure Fund of 31 TAC §363.1207, but dates and timing of SWIFT and SWIRFT applications will not be fixed by rule to give the board additional flexibility in the timing of when it will make funds available.

Recommended §363.1304 (relating to Prioritization Criteria) incorporates a priority criteria into the SWIFT and SWIRFT rules required by Texas Water Code §15.437. The recommended criteria provides for consideration of the various statutorily required factors, giving the most weight to those factors required by statute to receive the highest consideration. The recommended rules would implement the criteria for the local contribution to finance the project and the criteria related to federal funding for the project being used or sought by combining those two criteria into one category for obtaining points. In keeping with Texas Water Code §15.437(d)(6), the recommended rule has a criteria relative to water conservation.

Recommended §363.1305 (relating to Use of Funds) incorporates restrictions on the use of funds provided by Texas Water Code §15.474.

Recommended §363.1306 (relating to Interest Rates on Loans) identifies the timing and general method that the board would use to set the interest rates for SWIFT and SWIRFT project funding and payment deferrals.

Recommended §363.1307 (relating to Pre-design Funding Option) sets out the requirements for projects under this Subchapter to utilize the pre-design funding option.

Recommended §363.1308 (relating to Board Participation Program) sets out the requirements for projects where the applicant desires the board to acquire an ownership interest in the project that the applicant will buy back over time.

Recommended §363.1309 (related to Findings Required) states the findings by the board that are required prior to approval of an application for financial assistance under the SWIFT and SWIRFT program.

Recommended §363.1310 (related to Action of the Board on Application) sets out the board's range of options in acting on an application. The recommended rule states that the commitment will include a date after which the financial assistance will no longer be available. The executive administrator did not recommend a specific date by rule in order to retain some flexibility in adjusting the time period.

Recommended §363.1311 (relating to Rural and Water Conservation Reporting) sets out how the board intends to report and account for the project funds: (1) not less than 10% of which support projects for rural political subdivisions and agricultural water conservation, and (2) not less than 20% of which support projects for water conservation and reuse, including agricultural irrigation projects which are designed for water conservation and reuse. This section is in part to implement Texas Water Code §15.434(b).

The recommended rule would require the executive administrator to assign costs to the specified categories. Any costs that are shared would be proportionally allocated. For example, for a project that served a diverse urban and rural area, the executive administrator would first decide which costs are associated with the urban area and which costs are associated with the rural area. For the remaining costs that are shared by both areas, the percentage allocated to rural would be the ratio of rural costs to the total of direct urban and rural costs.

Recommended §363.1312 (relating to Reporting Requirements Regarding Historically Underutilized Businesses) sets out a requirement that political subdivisions and nonprofit water supply corporations report to the executive administrator the use of historically underutilized businesses, if any, that worked on the SWIFT or SWIRFT funded project prior to the executive administrator issuing a certificate of completion. This reporting is intended to allow the executive administrator to then be able to report this information to the State Water Implementation Fund for Texas Advisory Committee as required by Texas Water Code §15.438(n)(2).

Recommended Amendment to 31 TAC Chapter 353, Subchapter A (relating to General Provisions).

The recommended amendment to §353.3 (relating to Board Meetings) would make changes to the scheduling of board meetings, the presiding board member in the absence of the Chairman,

and the calling of special meetings of the board. The amendment is necessary because the 83rd Legislature amended Texas Water Code §6.060 (relating to Board Meetings).

Recommended Amendments to 31 TAC Chapter 356, Subchapter A (relating to General Provisions).

The recommended amendment to §356.10 (relating to Definitions) would amend the definition of "Board," for purposes of 31 TAC Chapter 356, (relating to Groundwater Management) by deleting any reference to the number of board members serving as the governing body of the state agency, the Texas Water Development Board. The amendment is necessary because the 83rd Legislature amended Texas Water Code §6.052 (relating to Members of the Board; Appointment) to change the composition of the board from six members to three members.


Recommended Amendments to 31 TAC Chapter 367.2, (relating to Definitions).

The recommended amendment to §367.2 (relating to Definitions) if adopted, would amend the definition of "Board," for purposes of 31 TAC Chapter 367, (relating to Agricultural Water Conservation Program) by deleting any reference to the number of board members serving as the governing body of the state agency, the Texas Water Development Board. The amendment is necessary because the 83rd Legislature amended Texas Water Code §6.052 (relating to Members of the Board; Appointment) to change the composition of the board from six members to three members.

RECOMMENDATION

Authorize the adoption and publication of amendments to 31 TAC Chapter 363 relating to Financial Assistance Programs, 31 TAC §353.3 of Subchapter A relating to Board Meetings, 31 TAC §356.10 of Subchapter A relating to Definitions, and 31 TAC §367.2 relating to Definitions, along with the proposed addition of Subchapter M to 31 TAC Chapter 363 relating to the State Water Implementation Fund for Texas (SWIFT) and the State Water Implementation Revenue Fund for Texas (SWIRFT).

This recommendation has been reviewed by legal counsel and the action requested is within the authority of the Board.



Les Trobman
General Counsel

Attachments: Recommended rule for publication in the Texas Register

The Texas Water Development Board (board or TWDB) adopts amendments to 31 TAC §§363.1, 363.2, 363.33, 363.51, 363.731, 363.951, 363.953, and 363.955 and new §§363.1301 - 363.1312. Amended §§363.33, 363.51, 363.731 and 363.953, and new §§ 363.1302, 363.1304, 363.1305, 363.1306, 363.1307, 363.1308 and 363.1311 are adopted with changes to the proposed text as published in the July 11, 2014, issue of the *Texas Register* (39 TexReg 5306). Amended §§363.1, 363.2, 363.951, and 363.955 are adopted without changes to the proposed text and will not be republished. New §§363.1301, 363.1303, 363.1309, 363.1310, and 363.1312 are adopted without changes to the proposed text and will not be republished.

The adopted amendments to §§363.1, 363.2, 363.33, and 363.51, relating to Financial Assistance Programs, ensure consistency with recent statutory amendments made to Chapter 15, Texas Water Code, relating to the establishment of the State Water Implementation Fund for Texas (SWIFT) and the State Water Implementation Revenue Fund for Texas (SWIRFT), and to Chapter 17, Texas Water Code, relating to Construction Contract Requirements, Inspection of Projects, and Certificates of Approval. The specific provisions being amended and the reasons for the amendments are addressed in more detail below.

The board adopts amendments to §363.731 of Subchapter G relating to Small Community Emergency Loan Program, to ensure consistency with recent statutory amendments to Chapter 17, Texas Water Code, relating to Construction Contract Requirements, Inspection of Projects, and Certificates of Approval. The specific provisions being amended and the reasons are addressed in more detail below.

The board adopts amendments to 31 TAC §§363.951, 363.953, and 363.955, of Subchapter I, relating to Pilot Program for Water and Wastewater Loans to Rural Communities, to ensure consistency with recent statutory amendments to Chapter 17, Texas Water Code, relating to Construction Contract Requirements, Inspection of Projects, and Certificates of Approval. The specific provisions being amended and the reasons are addressed in more detail below.

The board adopts a new Subchapter M, §§363.1301 - 363.1312, relating to the SWIFT and the SWIRFT, to implement certain recent statutory amendments to Chapter 15, Texas Water Code, Subchapters G and H relating to the SWIFT and the SWIRFT. These new rules are addressed in more detail below.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES.

The Legislature created the SWIFT and SWIRFT to ensure financial assistance is available to provide an adequate water supply for the future of this state. The SWIFT was created by the Legislature to serve as a water infrastructure bank in order to enhance the financing capabilities of the TWDB under constitutionally created programs and revenue bond programs. No financial assistance is provided from the SWIFT directly to political subdivisions or nonprofit water supply corporations. Instead, SWIFT provides a source of revenue or security for board financial programs and provides a cash flow mechanism under which money used in board programs can flow back to the SWIFT to provide protection for the SWIFT corpus. Money in the SWIFT will

be available to provide support for low-interest loans, longer repayment terms for loans, incremental repurchase terms for projects in which the state owns an interest and deferral of loan payments. The financial assistance cannot be in the form of a grant. The SWIRFT was created by the Legislature for use in managing revenue bonds issued by the board that are supported by the SWIFT. The SWIFT and SWIRFT programs are solely for the purpose of supporting projects in the state water plan.

In the preamble and rule, reference is often made to the “SWIFT and SWIRFT,” since financial assistance to political subdivisions will be provided from SWIRFT with support from SWIFT. SWIFT also may be used to support board programs in addition to SWIRFT to provide financial assistance for certain state water plan projects. Use of the phrases “SWIFT and SWIRFT,” or “SWIFT or SWIRFT,” in the preamble and rules is intended only to describe the programs and is not intended for any purpose to describe the movement of monies between the two funds. The use of this nomenclature is not intended to reflect the formal legal and tax structure of these programs.

The board is adopting the present rules to implement the SWIFT and the SWIRFT by creating a new subchapter in Chapter 363, relating to Financial Assistance Programs. By placing the SWIFT and SWIRFT into this chapter, the provisions of Chapter 363 will apply to the SWIFT and SWIRFT programs unless those provisions conflict with Subchapter M, relating to the SWIFT and the SWIRFT. This allows the board to use the procedures and practices common to many of the board's existing financial programs rather than to recreate them separately in the SWIFT and SWIRFT rules. Applicants will find the utilization of existing and understood practices more convenient and efficient, as opposed to having to navigate and understand a totally new rule and process. Because we are placing the SWIFT and SWIRFT program as a new subchapter in existing rules, to read and understand all of the rules that will apply to the program, Chapter 363, Subchapter M, relating to SWIFT and SWIRFT, must be read together with Subchapter A, relating to General Provisions. The board is currently examining its processes and procedures for all of its financial programs looking for efficiencies and process improvements. The board intends to continually seek to enhance our processes to be as efficient as possible, consistent with our statutory duties and fiduciary responsibilities.

The executive administrator envisions that the application process for SWIFT and SWIRFT loans will function similar to the process for the existing Water Infrastructure Fund program, as modified by any process improvements. On a schedule specified by the board, the TWDB will announce that they will be taking applications for SWIRFT/SWIRFT loans. As it is currently structured in the Water Infrastructure Fund program, the executive administrator anticipates receiving an initial abridged application and longer application at the appropriate time. The executive administrator will develop a prioritized list of applications based on the criteria specified in §363.1304. The prioritized list of projects, as developed by the executive administrator, will go to the board for deliberation and preliminary decision. Those projects that are selected by the board for funding may be required to submit additional information as part of the due diligence process. The financial application will then be subject to the executive administrator's traditional analysis for project viability, ability to repay the loan, and other considerations.

The executive administrator envisions that once the staff analysis is complete, based on the application and due diligence process, the application will go to the board for their deliberation and decision. If the board has made a commitment to fund the project, similar to the current process, the applicant will execute a financing agreement that allows the board to include the applicant's requested amount in the TWDB's bond issue and that specifies when the applicant must close on the loan with the board. The board may require that the applicant must close within a very short time of the board obtaining the proceeds from its bond issue that it will use to fund the loan with the applicant. The timing between commitment and closing is discussed in further detail in the section by section analysis. Interest rates and the terms and conditions of the loans and any repurchase agreements will be developed on a case-by-case basis and will depend on what is necessary to meet the immediate and long-term needs for water as contained in the state water plan existing at that time, what is necessary to preserve the long-term viability of the SWIFT and SWIRFT program, and current market conditions, among other considerations.

The executive administrator anticipates, prior to the first round of SWIFT and SWIRFT funding, developing an instructional and Frequently Asked Questions document that will further detail the application and due diligence process.

SECTION BY SECTION DISCUSSION OF ADOPTED RULE.

Adopted Amendments to 31 TAC Chapter 363, Subchapter A (relating to General Provisions).

The adopted amendment to §363.1 (relating to Scope of Subchapter) adds the State Water Implementation Fund for Texas and the State Water Implementation Revenue Fund for Texas to the list of financial assistance programs covered by Chapter 363. The change is required because the board is implementing these new financial assistance programs by adding a Subchapter M to Chapter 363.

The adopted amendment to §363.2 (relating to Definitions of Terms) adds the acronym SWIFT for the State Water Implementation Fund for Texas and the acronym SWIRFT for the State Water Implementation Revenue Fund for Texas to the definitions used in Chapter 363 in order to have a convenient way to refer to these programs throughout the Chapter.

The adopted amendment to §363.33 (relating to Interest Rates for Loans and Purchase of Board's Interest in State Participation and Board Participation Projects) adds loans from the SWIRFT to the list of loan financial programs for which the board will establish lending rate scales, in order to cover the new financial program established by House Bill 4, 83rd Leg., R.S., 2013, (HB 4). Non-substantive changes were also made to clarify that the section covers interest rates for both state participation and board participation programs.

The adopted amendments to §363.51 (relating to Inspection during Construction) adds the phrase "provisions for environmental mitigative measures," in order to be consistent with §363.731. The requirement that the project engineer give assurance that the project is constructed in accordance with sound engineering principles is deleted for consistency with Texas Water Code §§17.183(a)(5)(C), 17.185(a), and 17.187. The adopted section also adds the requirement that the

political subdivision or nonprofit water supply corporation must take corrective action on a project as necessary to complete the project in accordance with the approved plans and specifications, in order to be consistent with §363.731, (relating to Inspection During Construction). A non-substantive revision to the title of this section is adopted.

The adopted amendments to §363.731 (relating to Inspection During Construction) delete the requirement that the project engineer give assurance that the project is constructed in accordance with sound engineering principles for consistency with Texas Water Code §§17.183(a)(5)(C), 17.185(a), and 17.187.

The adopted amendment to §363.951 (relating to Construction Contract Requirements) adds the requirement that the executive administrator certifies that work on construction of a project has been completed in accordance with the approved plans and specifications, as well as deleting the requirement that the certification include that the work was done in accordance with sound engineering principles and practices, in order to implement Texas Water Code §17.183(a)(5)(C).

The adopted amendment to §363.953 (relating to Inspection of Projects) deletes the requirement that the project engineer give assurance that the project is constructed in accordance with sound engineering principles for consistency with Texas Water Code §§17.183(a)(5)(C), 17.185(a), and 17.187. The rest of that section is reworded for consistency with §363.51 and §363.731.

The adopted amendments to §363.955 (relating to Certificate of Approval) adds the words, "and specifications," and deletes "sound engineering principles," in order to implement Texas Water Code §17.187.

Adopted Amendment to 31 TAC Chapter 363 by addition of a New Subchapter M (relating to State Water Implementation Fund for Texas and State Water Implementation Revenue Fund for Texas).

New §363.1301 (relating to Scope of Subchapter M) is adopted to specify the scope and coverage of the Subchapter M. Subchapter M governs the board's new financial program to provide loans to political subdivisions and nonprofit water supply corporations to finance water management strategies in the state water plan. Subchapter A of Chapter 363 will also apply to the program except to the extent there is a conflict with Subchapter M, in which case Subchapter M will apply.

New §363.1302 (relating to Definition of Terms) is adopted to provide definitions of terms used throughout Subchapter M.

The adopted definition of "Agricultural water conservation" is defined by referring to the board's existing Agricultural Water Conservation Program. Those types of projects covered by the Agricultural Water Conservation Program would also be eligible for funding under the SWIFT and SWIRFT loan program if it were otherwise qualified, e.g. the project was a water management strategy in the state water plan. In keeping with that definition and Texas Water Code §17.898(a)(5), preparation and maintenance of land to be used for brush control activities

in areas of the state where those activities in the board's judgment are effective would also be eligible for SWIFT and SWIRFT loan funding.

The adopted definition of "Agricultural irrigation project" includes projects on agricultural lands that improve water delivery or application efficiency. The adopted definition would allow for new water sources such as a new well, as part of an agricultural irrigation project. Also included in the adopted definition are projects for new irrigation systems. Finally, the adopted definition would also cover meters within the definition of an agricultural irrigation project. To be eligible for SWIFT/SWIRFT funding, the project would have to be included in the state water plan. To be considered as contributing towards the 20% requirement of Water Code §15.434(b)(2), the project would have to be designed for water conservation or reuse.

The adopted rules define "Alternate facility," "Excess capacity," and "Existing needs," consistent with the use of those terms for the board's existing state participation program, 31 TAC §§363.1001 - 363.1017.

The adopted rule defines "Historically Underutilized Business" consistent with the definition in Texas Water Code §15.431, which references §2161.001, Government Code, and the implementing regulations of that section. Information on the state's Historically Underutilized Business program is available on the Comptroller's web site at <http://www.window.state.tx.us/procurement/prog/hub/>.

The adopted rule would define "Reuse" as the beneficial use of groundwater or surface water that has already been beneficially used because this is the definition used in the state water plan and the second use of water is required to be beneficially used as well as the first. See *Water for Texas 2012*, pages 170 and 249. This definition would include both direct reuse, where water that has been used once is treated and then reused, and indirect reuse where the once used water is treated, discharged to a surface water body or injected into an aquifer, and then retrieved at a later time.

The adopted rule would define "Rural" as required by Texas Water Code §15.434(b)(1)(A), which is to use the definition of "rural political subdivisions" found in Texas Water Code §15.992. The adopted rule uses that definition but further specifies that the board will use the most current data available from the U.S. Bureau of the Census or board-approved projections for the population figures.

The adopted rule would define "Water conservation" consistent with the definition in the state's best management practices guide for water conservation, first developed by the Water Conservation Implementation Task Force in 2004 and since maintained by the Texas Water Development Board pursuant to Texas Water Code Chapter 10, except that the phrase, "or increase the recycling and reuse of water" used in the best management practices guide is deleted from the definition. Texas Water Code §15.434(b)(2) uses "water conservation" and "reuse" as mutually exclusive terms. In light of this statutory language, the board's adopted rule continues the distinction.

The adopted rule defines "Water plan project" in a manner consistent with the use of the term in the state water plan and common usage among water professionals dealing with water resources planning in Texas.

The adopted rule defines "Water supply need" in a manner consistent with the use of the term in the state water plan and common usage among water professionals dealing with water resources planning in Texas and consistent with the use of the concept in Texas Water Code, Chapter 16, Subchapter C (relating to Planning).

Adopted §363.1303 (relating to the Prioritization System) provides a prioritization system required by Texas Water Code §15.437. The processing of applications and the steps in the adopted prioritization system is similar to the functioning of the prioritization system for the current Water Infrastructure Fund of §363.1207, but dates and timing of SWIFT and SWIRFT applications will not be fixed by rule to give the board additional flexibility in the timing of when it will make funds available. The actual factors to be evaluated in the prioritization are as required by HB 4. The adopted rule indicates that the board will identify the amount of funds available from SWIFT and SWIRFT for new applications by category. Categories may include: state participation; water infrastructure; deferred water infrastructure; rural political subdivisions or agricultural water conservation; and agricultural irrigation projects, water conservation, or reuse.

Adopted §363.1304 (relating to Prioritization Criteria) incorporates a priority criteria into the SWIFT and SWIRFT rules required by Texas Water Code §15.437. The adopted criteria provide for consideration of the various statutorily required factors, giving the most weight to those factors required by statute to receive the highest consideration. The adopted rules would implement the criteria for the local contribution to finance the project and the criteria related to federal funding for the project being used or sought by combining those two criteria into one category for obtaining points. In keeping with Texas Water Code §15.437(d)(6), the adopted rule has a criteria relative to water conservation. For municipal projects, the applicant can score points by demonstrating that they have already achieved significant water conservation savings or that significant water conservation savings will be achieved by implementing the proposed project. Municipal projects can also score points for achieving the water loss threshold that will be set by board rules in another board rulemaking proceeding roughly simultaneous with this rulemaking. While the adopted priority system does not have criteria for projects that serve rural political subdivisions, the board is of the opinion that many rural political subdivisions will be able to obtain points for the project meeting the needs of a high percentage of the water supply needs of the water users to be served. In addition, projects that serve rural populations may also be able to receive points in the diverse urban and rural category, or the regionalization category. As an example, a rural project that provides 100 percent of the water supply needs of the water users and that links five separate rural political subdivisions together in a regionalization project would receive 30 points for the high percentage of need category and 20 points for the regionalization criteria, for the maximum of 50 points for those factors receiving the highest consideration. That rural project would receive more points than an "urban" project that served a large population but only met 50 percent of the water supply needs and did not provide for

regionalization or serve a diverse urban and rural population. Actual scoring of a specific application will be based upon all relevant facts that weigh into a project's scoring.

Adopted §363.1305 (relating to Use of Funds) incorporates restrictions on the use of funds provided by Texas Water Code §15.474. The board expects that the terms of the financial assistance provided to applicants will be tailored to best fit the needs of the applicants and to benefit the long-term viability of the fund. The board expects that the terms of the financial assistance will change based on each round of applications. Interest rates on the loans provided to applicants under this program will depend in part on the board's cost of funds as the board issues bonds. Because the interest rate that the bond market charges to the board will vary over time, the interest rate that the board offers political subdivisions will also vary over time. In addition the amounts and types of funding provided to political subdivisions and nonprofit water supply corporations in preceding fundings affect the amounts and types of funding that can be provided to subsequent applicants while still protecting the corpus of the fund and the board's ability to offer financing on attractive terms.

Adopted §363.1306 (relating to Interest Rates on Loans) identifies the timing and general method that the board would use to set the interest rates for SWIFT and SWIRFT project funding and payment deferrals. The adopted provision is similar to the method for setting interest rates for the Water Infrastructure Fund, see 31 TAC §363.1205 (relating to Interest Rates for Loans) modified as necessary to fit the requirements of HB 4.

Adopted §363.1307 (relating to Pre-design Funding Option) sets out the requirements for projects under this Subchapter to utilize the pre-design funding option. The adopted provision is similar to how this option is handled in the Water Infrastructure Fund, see 31 TAC §363.1206 (relating to Pre-design Funding Option).

Adopted §363.1308 (relating to Board Participation Program) sets out the requirements for projects where the applicant desires the board to acquire an ownership interest in the project that the applicant will buy back over time. The requirements and terms are similar to the board's existing state participation program. Non-substantive changes were also made to clarify that the section refers to the Board Participation program under HB 4.

Adopted §363.1309 (related to Findings Required) states the findings by the board that are required prior to approval of an application for financial assistance under the SWIFT and SWIRFT program.

Adopted §363.1310 (related to Action of the Board on Application) sets out the board's range of options in acting on an application. The adopted rule states that the commitment will include a date after which the financial assistance will no longer be available. The board did not set a specific date by rule in order to retain some flexibility in adjusting the time period. The board is of the opinion that the adopted rule would allow the board to make commitments on individual projects over multiple years with specific take down amounts each year, with the interest rate for each take down determined by the debt service schedule in effect at the time. The board is of the opinion that multi-year take downs will be a beneficial option for funding larger projects with

high capital costs and longer construction schedules. Once the board has made a commitment, the applicant will execute a financing agreement that will specify when the loan must close. The board anticipates that the applicant must close within a very short time of the board obtaining the proceeds that it will use to fund the loan. The board recognizes that any undue delay between the board's obtaining funds through a sale of its bonds and closing loans with political subdivisions for their water projects has a negative impact on the overall capacity of the fund and the board is committed to minimizing those negative impacts.

Adopted §363.1311 (relating to Rural and Water Conservation Reporting) sets out how the board intends to report and account for the project funds: (1) not less than 10% of which support projects for rural political subdivisions and agricultural water conservation, and (2) not less than 20% of which support projects for water conservation and reuse, including agricultural irrigation projects which are designed for water conservation and reuse. This section is in part to implement Texas Water Code §15.434(b). The board understands that the percentages given in the statute are intended as a floor and not a ceiling, meaning that the board is not limited to funding only 10% of total project funds for rural and agricultural water conservation, or only funding 20% of total project funds for water conservation and reuse. If applicants submit sufficient eligible rural projects, the board could fund more than 10% rural projects, for example. The same is true for water conservation and reuse projects. The board intends to undertake to apply funding to these percentages by a very aggressive marketing and outreach program to ensure that potential applicants for all of these special classes of projects know the requirements and benefits of the programs. The board also intends to work with the regional water planning groups to ensure that they know about the programs and the requirements for either amending the regional water plan to include such projects or to include these types of projects in the next round of regional planning. The board does acknowledge that the SWIFT and SWIRFT program is a voluntary program for loaning money to political subdivisions and nonprofit water supply corporations.

The adopted rule would require the executive administrator to assign costs to the specified categories, e.g. rural political subdivisions, etc. when determining if any project funds count towards the requirements of Texas Water Code § 15.434(b). Any costs that are shared would be proportionally allocated. For example, for a project that served a diverse urban and rural area, the executive administrator would first decide which costs are associated with the urban area and which costs are associated with the rural area. For the remaining costs that are shared by both areas, the percentage allocated to rural would be the ratio of rural costs to the total of direct urban and rural costs. The board considered proposing a rule with a more detailed description of how it would allocate costs. In the end the board decided that no one method could cover every possible situation. Therefore, the board decided to adopt a rule that provides the executive administrator with some discretion in that calculation, coupled with the report to the Legislature as required by statute. The board will report the amount of funds used to support rural, agricultural water conservation, water conservation, agricultural irrigation projects, and reuse projects along with an explanation for the allocation on the board website along with the other information required by Texas Water Code §15.440.

Adopted §363.1312 (relating to Reporting Requirements Regarding Historically Underutilized Businesses) sets out a requirement that political subdivisions and nonprofit water supply corporations report to the executive administrator the use of historically underutilized businesses that worked on the SWIFT or SWIRFT funded project prior to the executive administrator issuing a certificate of completion. This reporting is intended to allow the executive administrator to then be able to report this information to the State Water Implementation Fund for Texas Advisory Committee as required by Texas Water Code §15.438(n)(2).

REGULATORY ANALYSIS

The board has reviewed the adopted rulemaking pursuant to Texas Government Code § 2001.0225, which requires a regulatory analysis of major environmental rules. A “major environmental rule” is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The board is required to conduct a regulatory impacts analysis of a major environmental rule when the result of the adopted rulemaking is to exceed a standard set by federal law, unless the adopted rulemaking is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government implementing a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law.

The specific intent of the adopted rulemaking is to implement new, state statutory requirements imposed by HB 4 on the Texas Water Development Board to provide financing options for projects in the state water plan through the provision of SWIFT and SWIRFT Funds. The board has determined that the adopted rulemaking does not meet the definition of “major environmental rule” under that section; therefore, no regulatory impacts analysis of the adopted rulemaking is required. No comments were received by the board on the draft regulatory impacts analysis.

TAKINGS IMPACT ASSESSMENT

The board has determined that the promulgation and enforcement of this adopted rule constitutes neither a statutory nor a constitutional taking of private real property. The adopted rule does not adversely affect a landowner's rights in private real property, in whole or in part, because the adopted rule does not burden or restrict or limit the owner's right to or use of property. The specific intent of the adopted rulemaking is to implement new state statutory requirements imposed by HB 4 on the Texas Water Development Board to provide financing options for projects in the state water plan through the provision of SWIFT and SWIRFT Funds. The adopted rulemaking would substantially advance this purpose by amending 31 TAC Chapter 363 to incorporate new statutory requirements. Therefore, the rulemaking does not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution.

PUBLIC COMMENT

Public hearings on the proposed rule were scheduled and held: on July 24, 2014, at Texas A&M University - San Antonio, One University Way, San Antonio, Texas 78224 at 1:00 p.m.; on August 13, 2014, at the McNease Convention Center, 500 Rio Concho Drive, San Angelo, Texas 76903 at 10:00 a.m.; on August 21, 2014, at the University of Texas at Arlington Research Institute, 7300 Jack Newell Boulevard South, Fort Worth, Texas 76118 at 7:00 p.m. Twenty-two individuals and organizations made oral comments at the public hearings.

Written comments were received from: The State Water Implementation Fund for Texas Advisory Committee; Representative Lon Burnam; Martin A. Hubert, Deputy Comptroller and the Texas Comptroller's designee on the State Water Implementation Fund for Texas Advisory Committee (Comptroller); American Council of Engineering Companies – Houston (ACEC); Brushy Creek Regional Utility Authority (Brushy Creek); Central Texas Water Coalition; City of Abilene (Abilene); City of Austin and Austin Water Utility (Austin); City of Brady (Brady); City of Corpus Christi (Corpus Christi); City of Houston (Houston); Clean Water Action; Climate Change Now Initiative; Coastal Bend Sierra Club; Environment Texas; Galveston Bay Foundation; Greater Texoma Utility Authority (GTUA); H2O4Texas; Hays Caldwell Public Utility Agency (HCPUA); League of Independent Voters of Texas; Lower Colorado River Authority (LCRA); National Wildlife Federation (NWF); North Fort Bend Water Authority (NFBWA); North Harris County Regional Water Authority (NHCRWA); North Houston Association (NHA); North Texas Municipal Water District (NTMWD); Population Media Center – Texas Chapter (Population Media Center); Region H Water Planning Group (Region H); Region M Water Planning Group (Region M); Rio Grande Regional Water Authority; San Antonio Water System (SAWS); San Jacinto River Authority (SJRA); Sierra Club – Lone Star Chapter (Sierra Club); Tarrant Regional Water District (TRWD); Texas Association of Builders (TAB); Texas Chemical Council (TCC); Texas Citrus Mutual; Texas Drought Project; Texas Farm Bureau; Texas Parks and Wildlife Department (TPWD); Texas Rural Water Association (TRWA); Texas & Southwestern Cattle Raisers Association; Texas Water Conservation Association (TWCA); Texas Water Infrastructure Network (TxWIN); The Nature Conservancy (Nature Conservancy); Upper Trinity Regional Water District (UTRWD); U.S. Capital Advisors; Water Smart Software; West Harris County Regional Water Authority (WHCRWA); and fifty-eight individuals. In addition to their organizations comments, Environment Texas submitted a written petition signed by 6,062 individuals; the Sierra Club – Lone Star Chapter submitted a letter on behalf of 1,535 individuals; and the National Wildlife Federation submitted a letter on behalf of 1,187 individuals. Environment Texas submitted a letter also signed by Texas Rivers Protection Association; Texas River School; Greater Edwards Aquifer Alliance; Environmental Defense Fund; Bayou City Outdoors; North Central Texas Communities Alliance; Medina County Environmental Action Association; Houston Climate Protection Alliance; Rio Grande International Study Center; Bexar Audubon Society; Jung Ko, PLLC; American Institute of Architects Houston COTE; Pinot's Palette Alamo Heights; Lamar Bruni Vergara Environmental Science Center, (collectively, Environment Texas).

RESPONSE TO COMMENTS

General Comments

Comment

The State Water Implementation Fund for Texas Advisory Committee commended the board on the open and thorough process that it used to produce and receive comments on the proposed HB 4 rules. They stated that the draft rule generally follows the intent and expectations of the Legislature regarding Texas Water Code §§ 15.434(b) and 15.437. The Advisory Committee further commented that the proposed rule's general approach was sound and not in need of major revisions.

Response

The board appreciates these comments. The board has not made any changes in response to these comments.

Comment

NWF, Nature Conservancy, NHCRWA, Region H, SAWS, Sierra Club, Texas and Southwestern Cattle Raisers Association, Texas Farm Bureau, TPWD, and TRWA expressed their appreciation for the inclusive and transparent stakeholder process that the board used in the development of the rule package. Several of these organizations specifically mentioned the extensive public hearings held in San Antonio, San Angelo, and Forth Worth to take comment on the proposed rule. H₂O4Texas, NHCRWA, and TAB thanked the board for diligently collecting stakeholder feedback from across the state.

Response

The board appreciates these comments. No changes were made in response to these comments.

Comment

Texas and Southwestern Cattle Raisers Association commented that they support the rule as proposed.

Response

The board appreciates the comment. No changes were made in response to this comment.

Comment

Representative Lon Burnam, Clean Water Action, Galveston Bay Foundation, National Wildlife Federation, Nature Conservancy, Population Media Center, Region H, Sierra Club, TPWD, TRWA, and 2,725 individuals appreciated and supported the board's statement of its understanding that the statutory 10% "set-asides" for rural political subdivisions and agricultural water conservation projects and the 20% for water conservation and reuse are intended as a floor and not a ceiling.

Response

The board appreciates these comments. No changes were made in response to these comments.

Comment

Austin, H₂O4Texas, SAWS, TAB, TCC, TRWD, and TWCA commented that the board should consider adopting the proposed rules on an interim basis with a definite commitment to revisit them no later than 18 months after the initial adoption. In their view this would allow an opportunity to assess the effectiveness of the rules, receive public input, and make potential refinements of the rules, if needed, after the first round of funding of projects has been administered under the program. H₂O4Texas commented that the TWDB is also in the process of promulgating rules regarding water loss audits. The HB 4 rules would award prioritization points for meeting the thresholds established in the water loss audit rules. The uncertainty regarding how these two rules will work together is seen by H₂O4Texas as an additional reason to adopt the HB 4 rules on an interim basis. NWF and Sierra Club commented that the TWDB should provide opportunities to revisit the rules once the implementation process has matured and becomes better understood.

Response

The board is willing to engage in an examination of the effectiveness of the rules after some experience has been gained with actual funding of projects and implementation of the rules is better understood. The board will do this transparently with stakeholder input; however, the board declines to lock themselves into any specific time frame for this process. Because of the flexibility built into the rules, many changes to the funding process can be made without changes to the rule. The board might decide that changes are immediately necessary well before the 18-month suggested deadline, or the board may want to have several rounds of funding before taking up the rules again. As the board and the public gain experience with the rules and the practical implementation of the program, the board will remain open to public input regarding the need for rule changes. Finally at any time interested persons may petition the TWDB to adopt a rule under Government Code § 2001.021. No changes to the proposed rule were made in response to this comment.

Comment

Abilene, NTMWD, SAWS, TRWD, and TWCA commented that the TWDB should share information regarding the likely mix of funding for different programs, the associated subsidies, and how the TWDB will determine the subsidies and potential range of subsidies.

Response

The TWDB plans to provide a range of the subsidies or minimum subsidy that will be available for each funding structure under SWIRFT with the solicitation of applications for the initial and subsequent rounds of state water plan funding. The TWDB expects that the terms of the financial assistance provided to applicants will be tailored to best fit the needs of the applicants and to benefit the long-term viability of the SWIRFT. The TWDB also expects that the terms of the financial assistance will change based on each round of applications. Interest rates on the loans provided to applicants under this program will depend in part on the TWDB's cost of funds as the TWDB issues bonds. Because the interest rate that the bond market charges to the TWDB

varies over time, the interest rate that the TWDB can offer to political subdivisions and nonprofit water supply corporations will similarly vary. As the TWDB funds more state water plan projects with SWIRFT funds, the types and amount of future funding provided to political subdivisions and nonprofit water supply corporations will be affected by previous fundings, and the investments that the Texas Treasury Safekeeping Trust Company has been able to make with the corpus of the SWIFT.

The TWDB does plan to develop information on the practical aspects of applying for funding. For applicants who are trying to determine the best TWDB program to access or the likely interest rate and other terms of a SWIFT/SWIRFT financial package, the TWDB strongly encourages applicants to meet with the appropriate TWDB Regional Water Planning and Development Team at a pre-application meeting to gather this information. No changes to the proposed rules were made in response to these comments.

Comment

TRWD and TWCA commented that funds should be delivered to the project owner or sponsor upon issuance, which would make funds available prior to soliciting bids for construction, and eliminate requirements that funds be placed in escrow.

Response

TWDB rules in 31 TAC Chapter 363, Subchapter A, provide the current mechanism for the release of funds that is consistent with the agency's statutory duties and fiduciary responsibilities. These rules provide for the release of construction funds from a project owner's escrow account to the project owner's construction account upon submittal of statutorily required bid documents and prior to the project owner issuing the notice to proceed. As a result, funds cannot be made available to the project owner or sponsor prior to the solicitation of bids for construction. The project owner will have access to the funds prior to the start of construction and the project owner is responsible for managing those construction funds in relation to its contractor schedule. No changes to the proposed rules were made in response to this comment.

Comment

TRWD commented to encourage the board to continue to finance real property acquisition, including reservoir sites, transmission rights-of-way, and other real property necessary for water supply project.

Response

The board appreciates the comment. The rule does not change the current practice of financing real property acquisition. No changes were made in response to this comment.

Comment

TxWIN commented that the proposed rules do not include language for encouraging participation in the procurement process by companies domiciled in the state or that employ a significant number of residents in this state. TxWIN commented that the TWDB and state

legislature have a duty to promote a competitive and transparent bidding and procurement process for the state's water infrastructure. TxWIN indicated it will work to address this issue in the near term with the SWIFT Advisory Committee and the TWDB. TxWIN further suggested changes to the TWDB's oversight of the bidding process and construction activities for projects utilizing TWDB funding.

Response

The executive administrator continues to evaluate the practices and policies of the TWDB in order to improve efficiency for all of the agency's financial programs. The TWDB seeks to work within its statutory authority and balance an appropriate amount of oversight with local responsibility. No changes to the proposed rules were made in response to these comments.

Comment

Sierra Club commented that it supports the agency's decision to utilize existing practices common to other TWDB financial programs where they don't conflict with HB 4. Sierra Club supports keeping the rules and structure to a minimum at this time. The Sierra Club commented that any potential non-rule program changes should be made available to a broad range of stakeholders for input.

Response

The board appreciates the comment. The executive administrator will seek stakeholder input on major non-rule changes. No changes have been made in response to this comment.

Comment

Galveston Bay Foundation, NWF, Sierra Club and one individual commented on how the board might make funds available to the 10% and 20% "set-aside" categories. NWF commented that the board should use the project categorization process as an additional mechanism for ensuring that deserving water conservation projects receive funding. NWF understands that the board wants to retain flexibility. NWF suggested the board employ that flexibility to categorize funding in a way that ensures, to the maximum extent reasonable, that all deserving water conservation projects receive funding. One individual commented that there needs to be a method to put conservation and reuse into a separate category and allocate 20% of each year's budget toward this category and use a similar method with the 10% category. Galveston Bay Foundation commented that the board needs to clarify how the 20% funds for conservation or reuse and 10% funds for rural and the prioritization criteria will work together. Sierra Club commented that for each application cycle the board should calculate amounts for categories as "not less than 20% to support projects, including agricultural irrigation projects, that are designed for water conservation or reuse, subject to receipt of eligible applications," and "not less than 10% to support projects for rural subdivisions or agricultural water conservation, subject to receipt of eligible applications." Funding for other categories should be identified as amount "up to" specific dollar figures, with the understanding that these amounts are subject to revision after applications for the set-aside categories have been reviewed and decisions made on those applications.

Response

The board acknowledges that the rules do not address how it will categorize funding prior to accepting abridged applications for project prioritization for funding. The board is developing those procedures in parallel to the rule development. This may or may not result in allocating a specific amount to the 10% and 20% categories. By keeping these procedures out of the rule, the board is able to quickly adapt to changing circumstances and revise the procedures as necessary to meet its statutory duties. No changes were made to the rule as a result of the comments.

Comment

Sierra Club commented that the regional planning groups' standards for prioritization of water projects need to be adopted by the TWDB through a rulemaking process and not just adopted by an item at a board agenda meeting. The uniform standards would benefit from the type of open stakeholder involvement and discussion that the board's HB 4 rule went through. Sierra Club does not believe that the criteria of sustainability and viability, especially in regard to climate change and variability and direct consideration of a project's environmental impacts, were adequately addressed during development of the uniform standards.

Response

HB 4 in several places requires the board to adopt rules to implement the statute, e.g. Texas Water Code § 15.439, but does not require the board to promulgate rules adopting the "uniform standards" used by the regional water planning groups during their prioritization process. Rather, Texas Water Code § 15.436(c) only requires the board to approve those standards. The board considered the uniform standards during its December 5, 2013, board meeting and received public comment at that time. The board declines to presume the authority to adopt rules when the Legislature has expressly used other language for the board's action. The board does encourage regional water planning groups to revisit the regional water planning groups criteria as necessary to ensure projects are appropriately scored at the regional level. No changes were made in the rule in response to this comment.

Comment

SAWS commented that the board should keep the rules broad enough to provide the option to fund loans involving some components of a public-private partnership.

Response

The board is of the understanding that in this respect the rules are as broad as the statute. Financing under HB 4 can only be provided to a political subdivision or a nonprofit water supply corporation, as defined in the statute. However, this does not preclude certain public private partnerships where the public entity's funding comes from the board and the remainder comes from a public private partnership arrangement between the public project sponsor and a private entity or entities. The board could also provide the financing for a public entity to purchase a privately developed project. The project would, of course, have to meet all statutory and rule requirements. No changes were made to the rule in response to this comment.

Texas Water Code § 17.183(8) -American Iron and Steel

Comment

TxWIN commented that the proposed rules do not address the U.S. iron and steel and manufactured goods as required by HB 4. SJRA commented that the TWDB's guidance document for the U.S. iron and steel and manufactured goods does not indicate a procedure for board concurrence on exceptions and requests an amendment to the guidance document or inclusion in the proposed rules.

Response

Texas Water Code § 17.183(a)(8) requires that financial assistance applicants receiving funds under that subchapter from the TWDB include in their construction contracts for water infrastructure a requirement that such contracts include a provision stating that iron and steel products and manufactured goods used in the project be produced in the United States, subject to several statutory exceptions.

Further, HB 4 defines the terms and describes the exemptions for the use of U.S. iron and steel and manufactured goods requirements but is not prescriptive nor does it require the TWDB to document compliance. The TWDB developed a procedure with stakeholder input to include language in construction contracts and on the general notes plan sheets. It is the responsibility of each recipient of financial assistance to enforce the provisions of its own construction contracts to ensure compliance with this requirement. No changes to the proposed rules were made in response to this comment.

Comment

Sierra Club commented that Property Assessed Clean Energy (PACE) projects could be funded by SWIFT/SWIRFT if a political subdivision would be the lender for the PACE project. Sierra Club encouraged the TWDB to develop and distribute guidance documents on how this new opportunity might be used effectively.

Response

The board does not believe that the adopted rule prohibits the use of SWIFT and SWIRFT funding for PACE projects; however, the PACE project would have to meet the statutory requirements of HB 4. The TWDB would have to take an application from a political subdivision or nonprofit water supply corporation that would become the local lender for the PACE project. The TWDB could not directly loan money to the businesses that participated in the local PACE project. The project would have to be included in the state water plan. The financial assistance would be in the form of a loan to the local political subdivision or nonprofit water supply corporation, and the TWDB could only loan money for the water conservation component of the PACE project. Energy efficiency measures would have to be funded through other means. The board is open to working with political subdivisions or nonprofit water supply corporations that want to explore developing a PACE program. No changes in the rule were made in response to this comment.

Comment

Texas Drought Project and 17 individuals provided comments that suggested specific additional strategies that could be undertaken by individuals or local water suppliers to increase water conservation.

Response

The TWDB lacks authority to require individuals or a water supplier to adopt specific water conservation strategies. The TWDB encourages these individuals to take their suggestions to their local officials for consideration for incorporation into their local water conservation plans. If local political subdivisions wish to apply for SWIFT/SWIRFT funding to implement all or part of their local water conservation plan, the TWDB reminds them to work with their regional water planning group to see that it is incorporated into the regional and state water plans as a water management strategy. This is necessary in order to qualify for funding under the SWIFT/SWIRFT program. No changes to the rules were made in response to these comments.

Comment

Eight individuals provided comments that argued either for or against using specific technologies as water supply strategies. Central Texas Water Coalition, Climate Change Now Initiative, League of Independent Voters of Texas, and four individuals provided comments related to improvements to the water planning process.

Response

The TWDB appreciated the suggestions and comments. The TWDB suggests that these groups and individuals contact their regional water planning group since it is at the regional water planning group level where decisions about specific strategies to meet water supply needs are made. No changes to the rules were made in response to these comments.

Comment

Texas Drought Project commented that grants, not loans, should be made available to political subdivisions to repair leaking pipes.

Response

The TWDB only has authority granted to it by the Texas Legislature. The Legislature was very clear in HB 4, Sec. 2.01 that the TWDB was not to make any grants using funds from the SWIFT and SWIRFT program. The board does have other programs in which some grant funds are available for rehabilitation of leaking pipes. No changes in the rule were made as a result of this comment.

Comment

Texas Citrus Mutual commented that the Rio Grande Valley (RGV) has not made much use of the TWDB's existing agricultural loan program and that "nothing in the SWIFT program" changes that situation. Texas Citrus Mutual further commented that this is the result of some

basic water conservation issues unique to the Valley, including a lack of incentives for farmers to conserve irrigation water and improve the irrigation distribution and delivery system and a lack of incentives for large farmers to achieve on-farm water savings with newer technology.

Response

The board appreciates these comments, but disagrees that HB4 funding would not be beneficial for the RGV. The board intends to fund agricultural water conservation projects through a very aggressive marketing and outreach program and will continue to work with regional water planning groups, including those in the RGV, to make use of that funding. The board agrees that partnerships between cities and irrigation districts would be worthwhile. No changes were made to the proposed rule in response to these comments.

§ 363.51 and § 363.731

Comment

TxWIN commented that the language in §§ 363.51 and 363.731 related to “sound construction principles” should be deleted, asserting that such language is extraneous, unnecessary, and vague. In addition TxWIN commented that the language may not be legally enforceable.

Response

The board has deleted the requirement from the rules which includes §§ 363.51, 363.731 and a similar provision in § 363.953. The board notes that plans and specifications submitted to the TWDB under Texas Water Code § 17.183(b) must include a seal by a licensed engineer affirming that the plans and specification are consistent with and conform to current industry design and *construction* standards, (emphasis added). And also under Texas Water Code §17.183(a)(2)(A), the contractor must furnish performance and payment bonds that guarantee that the contract will be completed and performed according to approved plans and specifications and in accordance *with sound construction principles and practices*, (emphasis added).

§ 363.1302(1) Definition of agricultural water conservation

Comment

Sierra Club and TPWD commented that they support the proposed definition of “agricultural water conservation.” Sierra Club did suggest that the rules should require an analysis from an applicant for a brush control project that would allow the TWDB to fully evaluate whether the brush control project will actually produce water, the quantified amount of conserved water, whether the water made available can be used on a sustainable basis, and the cost-benefit of the project.

Response

The board appreciates the comments in support of the proposed definition. The board is not convinced that it needs an extensive analysis from an applicant for the board to determine that the brush control project would be located, “in areas of the state where those activities in the board’s judgment would be most effective.” Any brush control project funded by SWIFT/SWIRFT, as any other project, must be in the state water plan to qualify. The board has not made any changes to the rule in response to this comment.

§ 363.1302(2) Definition of agricultural irrigation project

Comment

NWF, Nature Conservancy, and Sierra Club all had concerns with how the definition of an agricultural irrigation project would work together with the reporting and set-aside requirements of § 363.1311. NWF had no objections to the proposed broad definition of agricultural irrigation projects. However, NWF believes that only those agricultural irrigation projects that are designed for water conservation or reuse count toward meeting the 20% requirement. NWF thought that the issue could be resolved with modifications to § 363.1311. If those changes were not made, then a change to the definition would be in order. Sierra Club and Nature Conservancy commented that the purchase and installation of new water sources or new irrigation systems should not be considered to count toward the 20% conservation or reuse “set-aside”.

Response

The board understands the legislative intent was that agricultural irrigation projects designed for water conservation or reuse qualify to support the 20% requirement of Texas Water Code § 15.434(b). The board has made a change to § 363.1311 to clarify this point. The board notes that the purchase and installation of new water sources and new irrigation systems are included in the definition of agricultural irrigation projects. Agricultural irrigation projects can only count toward the 20% requirement if they have been designed for water conservation or reuse. Accordingly, no change in the rule has been made to the definition of an agricultural irrigation project.

§ 363.1302(9) Definition of facility

Comment

The Comptroller commented that facility is defined as a *regional* facility and questioned whether this would require all facilities under consideration by the rule to be regional facilities. The Comptroller suggested removing “regional” from the definition and inserting “regional” in the rule where appropriate.

Response

With one exception, “facility” is only used in the rule in connection with state participation funding. State participation funding is only available for regional projects. Therefore, the board declines to make the suggested change. The proposed rule did use “facility” in § 363.1305 in relation to the length of the loan. That use of the term is not intended to be exclusively for

regional projects, so that section has been revised to cover any project financed by SWIRFT funds.

§ 363.1302(14) – Definition of Reuse

Comment

TPWD commented that they support the definition of reuse.

Response

The board appreciates the comment. No changes were made in response to the comment.

Comment

NWF and Sierra Club commented that the definition for reuse is too broad. NWF suggested limiting the concept of reuse by inserting the word “beneficial” before the first “use” in the definition.

NWF and Sierra Club further commented that reuse should be defined to exclude storage reservoirs and aquifer storage and recovery (ASR) projects from the definition of reuse. Coastal Bend Sierra Club commented that ASR projects should not be included in the reuse definition. NWF and Sierra Club believe that it is inappropriate to allow large infrastructure components that are not unique to conservation to fit within the 20% “set-aside”.

Response

The board agrees that the water being reused must be beneficially used for the second time to be considered a reuse project as intended by the Legislature. Accordingly, the rule has been changed to add the word “beneficial.”

No two water infrastructure projects are exactly the same. Projects differ in important aspects, including system losses while water is in storage. For this reason, the board does not wish to make categorical pronouncements of which categories of particular technologies will or will not be considered water conservation or reuse. The board will make these decisions on a case-by-case basis. Any projects considered as water conservation or reuse will be so identified on the board’s SWIFT projects web page.

§ 363.1302(15): Definition of rural political subdivision

Comment

Sierra Club and TRWA support the definition of a rural political subdivision in the proposed rules and agree that the use of the most current data from the U.S. Bureau of the Census or board-approved population projections is appropriate.

Response

The board appreciates the comment. No changes were made to the rule in response to these comments.

Comment

Region M commented that the definition of “rural entity” seems to include those that are not water user groups in the current water planning process and wanted clarification that municipalities with fewer than 500 people are included in this definition.

Response

The board notes that there is no definition of “rural entity” in the rule. Rural political subdivision is defined in order to implement the 10% requirement of Texas Water Code § 15.434(b) for projects going to rural political subdivisions. Water user group is a concept for planning that groups similar entities together. Project financing under SWIFT/SWIRFT is made to political subdivisions and nonprofit water supply corporations. Therefore there is no direct correspondence between water users groups and applicants for project funding. The definition of a rural political subdivision in the rules includes municipalities with fewer than 500 people, using the most current available data from the U.S. Bureau of the Census, or other board-approved population projection figure. No changes to the proposed rules were made in response to this comment.

Comment

Brady commented that the definitions of “rural” and “urban” need to be distinct from one another. Many Texas rural communities are far removed from both major cities and urban areas. Rural communities are generally economically independent of neighboring large cities. Interconnections to regional infrastructure systems are generally non-existent.

Response

The Legislature defined the term “rural political subdivision” for purposes of the SWIFT/SWIRFT program by reference to the definition in Texas Water Code § 15.992, and the board chose to define “rural population” consistent with this legislative direction. No changes have been made in response to this comment.

§ 363.1302(18) Definition of water conservation

Comment

The State Water Implementation Fund for Texas Advisory Committee, Representative Lon Burnam, LCRA, NWF, Nature Conservancy, Population Media Center, Region H, Sierra Club, Water Smart Software, and 1,542 individuals commented that the definition of “water conservation” should not include the concept of “reuse.” The Advisory Committee stated that separating the two concepts would assure the public that the board does not intend to meet its obligations under Texas Water Code § 15.434(b) in ways that might be confusing to the public or

deviate from the intent of HB 4 to support both water conservation and reuse. Representative Lon Burnam pointed out that HB 4 uses water conservation and reuse as two separate concepts.

TPWD supported the proposed definition of water conservation. ACEC, Houston, NFBWA, SJRA, U.S. Capital Advisors, and WHCRWA supported the proposed definition of water conservation that included the concept of reuse.

Response

After review of HB 4, the board is of the opinion that the Legislature used the terms water conservation and reuse as two separate concepts with the intent to draw a clear distinction between these two concepts. Therefore, the rule has been revised to separate reuse and recycling from the definition of water conservation for the purpose of this program. Similarly, the definition of agricultural water conservation includes the concept of reuse. Therefore, the words "or reuse" have been deleted from the definition of agricultural water conservation as well. This change of definition for agricultural water conservation will not disqualify any otherwise eligible project from SWIFT/SWIRFT financial assistance. At most, it may change a category in which a project fits. A definition of reuse is included in the final rule.

Comment

Representative Lon Burnam, League of Independent Voters of Texas, Region H, TAB, and 1,541 individuals commented that addressing water loss by repairing or replacing aging and leaking pipelines are worthwhile projects and falls within the definition of water conservation.

Response

The board agrees that repairing or replacing aging and leaking pipes falls within the definition of water conservation in that it would be a practice or technique that reduces the loss or waste of water and that such projects are worthy of financing and implementation. To the extent that such projects may not be included in the state water plan, the board has other financing programs to cover these projects.

Comment

Representative Lon Burnam, NWF, Sierra Club, and four individuals commented that aquifer storage and recovery (ASR) projects should not count as water conservation projects or at least should not count toward the satisfaction of the statutory duty to apply 20% of funding toward water conservation or reuse.

Response

No two water infrastructure projects are exactly the same. Projects differ in important aspects, including system losses while water is in storage. For this reason, the board does not wish to make categorical pronouncements of which categories of particular technologies will or will not be considered water conservation or reuse. The board will make these decisions on a case-by-case basis. Any projects considered as water conservation or reuse will be so identified on the board's SWIFT projects web page.

Comment

Clean Water Action commented that they appreciated that the definition of water conservation was based on the state's best management practices guide and that the rules award points to applicants who have already achieved considerable water use savings and water loss reductions.

Response

The board appreciates the comment. No changes have been made to the rule as a result of this comment.

§ 363.1302(19): Definition of water plan project

Comment

Abilene, HCPUA, LCRA, NTMWD, TRWD, and TWCA submitted comments related to the definition of "water plan project" in proposed 31 TAC § 363.1302(19). HCPUA commented that they support the proposed definition as written. In their view, if the definition were expanded to include alternative strategies, it would undermine the regional planning process. NTMWD and Abilene commented that the board should consider amending the proposed definition of "water plan project" in 31 TAC § 363.1302(19) to clarify that water plan projects eligible for SWIFT funding include projects contained in a regional water plan pursuant to an amendment of that plan, as contemplated in 31 TAC § 357.51. They believe this would eliminate confusion as to what qualifies as a "water plan project" and would allow applicants more flexibility in defining and refining their strategies in a timely manner. LCRA and TWCA commented that the board should consider amending the proposed definition of "water plan project" to include alternative water strategies in a regional water plan as they are "fully evaluated" and, per the TWDB's processes, may be substituted into a regional water plan if a recommended management strategy is no longer recommended.

Response

In keeping with the "bottom-up" nature of water planning in Texas the board is of the opinion that the regional water planning groups should have the decision on whether or not a water management strategy that they did not include as a recommended strategy should be included as a project eligible for SWIFT/SWIRFT funding. 31 TAC § 357.51 provides the TWDB process by which regional water planning groups may amend adopted regional water plans. A regional water plan may be amended through either a minor or major amendment or through substitution of an alternative water strategy. This process is in place in order to effectively develop the state water plan in a manner that does not, for example, over-allocate water sources and avoids interregional conflicts. The TWDB is required pursuant to 31 TAC § 357.51(f) to approve "necessary" amendments, including substitutions of alternative water strategies, to the state's water plan. A "necessary" amendment is an amendment to an adopted regional water plan approved by a regional water planning group in accordance with the provisions outlined in 31 TAC § 357.51.

"Water plan project" has been defined in a manner consistent with its use in the state water plan and common usage amongst water professionals. Further, Texas Water Code § 15.432 explicitly

states the Legislature's intent in creating the SWIFT fund, stating that financial assistance from "the fund will never be used for a purpose other than the support of projects in the state water plan." Because the TWDB currently provides a mechanism by which amendments to, and alternative water strategies in, regional water plans adopted by regional water planning groups can become part of the state water plan, it is not necessary to amend the definition of "water plan project" as suggested by the commenters. No changes to the proposed rule were made in response to this comment.

§ 363.1303 Prioritization System

Comment

The Comptroller commented that in § 363.1303(c) the board reserves the right to limit funding available to an individual entity. The Comptroller suggests that last sentence of that subsection should be changed to: "The board reserves the right to limit the amount of funding available to an individual entity or project." This suggested change could provide the board additional flexibility if multiple entities agree to split the costs of financing a regional project.

Response

If multiple entities agree to split the financing cost of a regional project, the board believes that the existing language in the rule would give the board the ability to limit funding of each individual entity participating in the project. Therefore, a change is not necessary to give the board additional flexibility. No changes have been made to the rule as a result of the comment.

Comment

TCC commented that the board should have the ability to revisit a project's particular scoring under the prioritization rules. Over time there will be changes in circumstances that could result in changes in the points awarded under the prioritization process, such as increased local contribution, obtaining environmental permits, or other circumstances. The TCC believes the board should have the flexibility to take new conditions into account.

Response

The board wants to clarify that, in accordance with the statute, the board will only be prioritizing those projects that elect to submit an abridged application to the board for financial assistance, *see* Texas Water Code § 15.437(b). The board intends to prioritize these projects, ask for full financial applications, and make funding commitments, all within a matter of months. There will not be that much time for conditions to change. If an applicant receives a low score and does not obtain a commitment, the applicant is free to seek financing again in the next round of board funding. The project will be rescored in the next round of funding based on current conditions. No change has been made in response to this comment.

§ 363.1304 Prioritization Criteria

Comment

Region H, Texas Farm Bureau, and TRWA commented that the prioritization criteria appear to appropriately balance the multitude of competing prioritization factors. TRWA supports the prioritization provisions. TRWA commented that they appreciate the renewed emphasis that the board is placing on meeting the needs of rural Texas.

Response

The board appreciates the comments. No changes were made as a result of these comments.

Comment

Abilene, Austin, H₂O4Texas, NHCRWA, NTMWD, TAB, TCC, TRWD, and TWCA commented that the rules need to be changed so that the prioritization system clearly deals with the situation where a project in the state water plan is dependent on or directly related to other projects within the plan. For example, a pipeline project may be listed and ranked as a separate project in a plan, yet it is only useful if one or more water supply projects in the plan are implemented to generate the water supply to be conveyed in the pipeline. These organizations commented that the board should allow the prioritization of projects to be linked to other projects that depend on that first project. TRWD and TWCA suggested that the board should consider awarding point scores to projects equal to the highest point score that any other related or dependent project receives. NTMWD, TRWD, and TWCA commented that local contribution toward any of the related or dependent projects should count the same as if the contributions were directly made to the project for which funding is sought.

Response

Larger projects on which other projects depend may already receive higher point scores as a result of the higher total population and volume of water needs of the end users served by these projects. The board feels that scoring projects based on the more easily measured end beneficiaries of each project will make for more consistent, repeatable, and fair scoring than trying to establish scores based on less clear relationships to other projects. The uniform standards developed by the HB 4 stakeholder committee for the purpose of prioritizing projects at the regional level may offer an avenue to address the concern of the commenters. Therefore, the board declines to make the requested change.

Comment

Region M commented that specific water user groups served by a project should be scored based on how the project is described in its application rather than what is listed in the state water plan. It also commented that because of the longer-term planning cycle as compared to the shorter-term funding cycles, it is important for changes in regional projects to be scored according to their most-up-to-date agreements and configurations.

Response

The SWIFT and SWIRFT programs are solely for the purpose of supporting projects in the state water plan; therefore, objective scoring of a water plan project must take into consideration relevant information contained in the state water plan, for example, with respect to points awarded based on state water plan needs that would be met by the proposed project. Many elements of the prioritization scoring will be based on the submitted funding application that may contain updated information about the project and participating entities including, for example, criteria scoring under §§ 363.1304(2)-(4). No changes to the rule were made in response to this comment.

§ 363.1304(1)

Comment

LCRA commented that further clarification is needed on the first four criteria of subsections (2) through (5). LCRA commented that they understood that the intent was to have a maximum score of 50 points for the first four criteria. LCRA pointed out that several of the maximum points for the subsections could be combined to have a point total in excess of 50 points.

Response

The 50 points is intended to function as a cap on the sum of the individual scores for the first four items. For a particular application, the applicant gets the lesser of the sum of the individual first four items or 50 points. For example, if the sum of the first four items for a particular application was 65, then the applicant would be scored as a total of 50 points for those four items. The rule has been reworded to clarify this intent.

Comment

SJRA commented that the board should remove the cap of 50 points for the first four criteria or raise the maximum number of points for the first four criteria. SJRA raised the possibility that because of the tie-breaker provisions of § 363.1304(13), a project that scored 75 points could end up receiving the third highest priority among two other projects that received 52 points each.

Response

As explained elsewhere in the preamble, the cap of 50 points for the first four priority criteria is an attempt to increase the ability of rural projects to achieve enough points to receive financial support and assist the board in fulfilling its statutory duty to undertake to apply not less than 10% for funding to support projects for rural political subdivisions and agricultural water conservation projects. Texas Water Code § 15.434(b)(1). The board did not receive alternatives to the 50 point cap that would give the board some assurance that rural projects will receive sufficient points in the project prioritization system. The board declines to make any changes to the rule in response to this comment.

§ 363.1304(2) – Serve a Large Population

Comment

The Comptroller commented that a literal or strict reading of § 363.1304(2) could allow a city with a large population to accrue all of the points for each subdivision, i.e., a city of 2 million would receive points for having at least 10,000 population, plus points for having at least 250,000 population, etc. The Comptroller notes that similar issues appears in §§ 363.1304(7) and (12).

Response

The board agrees that the intent of the section could be misunderstood. Therefore, the board has revised the final rule to clarify the intent in such a way that a city would receive points under one subsection only. Similar revisions have also been made to §§ 363.1304(7) and (12).

Comment

Austin, Brushy Creek, GTUA suggested that the board reconsider the range of population categories. GTUA and Brushy Creek's specific concern was that the 10,000 to 250,000 population range includes a large number of cities. For some areas of the state, applicants will not be able to put a regional project together that has more than 250,000 population. Brushy Creek suggested further discretization of the population levels, with a scale that increases in magnitude until the 1 million mark is reached. For example, 6 points for 10,000; 12 points for 100,000; 18 points for 250,000; etc. Austin's specific concern was that the top tier should include a lower population so that more large urban areas would get high points.

Response

The board is implementing a requirement of the statute to give the highest consideration to projects that will serve a large population. The board had initially thought to have a much higher threshold before an applicant could get any points under this category. The board recognizes that those projects from moderate-sized population areas are significant projects, so the board proposed its rule that would give at least some points to moderated-sized cities. However, to take points from the truly large population centers and redistribute those points to smaller population applicants seems to the board to run counter to the legislative intent of the provision in the statute to prioritize projects that will serve large populations. Similarly, lowering the population limit for the top tier of cities would dilute the value of the points for the very largest populations. The board has not made any changes to the rule in response to this comment.

Comment

Sierra Club commented that the criteria needed clarification. Sierra Club questioned the meaning of the phrase "in conjunction with" and asked how it would be determined.

Response

The board agrees that the intent of the section could be misunderstood. Therefore, the board has revised the final rule to clarify the intent in such a way as to make clear that any related projects must be directly relying on the same water volumes.

§ 363.1304(3)(A) – Serves a Diverse Urban and Rural Population

Comment

Corpus Christi, H₂O4Texas, and TAB commented that § 363.1304(3)(A) could unintentionally penalize a project that serves an urban population and multiple rural populations, which appears inconsistent with § 363.1304(3)(B). H₂O4Texas asks for clarification of the rule. Corpus Christi commented that, strictly interpreted, a city that serves one urban population and multiple rural populations could not get 10 points. Corpus Christi suggested that if the board would add “or more” between “one” and “rural,” then they could get 40 points.

Response

A project that only serves an urban or only serves a rural population would get zero points for serving a diverse urban and rural population, § 363.1304(3)(C). A project that serves one or multiple urban populations and only serves one additional rural population would get 10 points under this factor, § 363.1304(3)(A). A project that serves multiple urban populations and serves two rural populations would get 10 points for serving the first rural population, § 363.1304(3)(A), and would get 4 additional points for serving the second rural population, § 363.1304(3)(B). A project that serves multiple urban populations and three rural populations would get 10 points for serving the first rural population, 4 points for serving the second rural population, and 4 points for serving the third rural population. The points that an applicant can get under this criteria are capped at 30 points. If the board were to adopt the suggested language for subsection (3)(A) of serving one or more rural populations, strictly interpreted, this would make subsection (3)(B) irrelevant. The applicant would get only 10 points for serving all the rural areas, and there would be no additional rural areas for which additional points could be awarded. The board has made no changes to the rule in response to this comment.

Comment

Abilene commented that points awarded for serving a diverse urban and rural population should be based on the percentage of the project intended to serve rural participants. This would score a project that was going to serve a high percentage of rural residents higher than a mostly urban project that was also going to serve a small percentage of rural residents.

Response

The rule achieves roughly the same results, but without potentially penalizing larger urban entities that by their nature might have difficulty incorporating a high percentage of rural participants relative to their projects. The more rural populations served by the urban area, the more points the project will receive, up to the cap of 30 points. No changes have been made in the rule as a result of this comment.

§ 363.1304(4) – Regionalization

Comment

Upper Trinity Regional Water District commented that they support giving priority to funding regional water supply projects that serve multiple jurisdictions. Upper Trinity is concerned that a utility that is part of a regional system or strategy should not lose access to the rural funds, and rural political subdivisions should be given more points if they can join a regional strategy to address their needs.

Response

The board appreciates the comment. Under the rule, regional projects will get points under the § 363.1304(4) regionalization criteria. In addition, any regional projects that also serve a diverse urban and rural population will also get points under the § 363.1304(3) criteria of serving a diverse urban and rural population. Regional projects will not lose access to “rural” funds under the rule. The board has not made any changes to the rule as a result of this comment.

Comment

Region M commented that the regionalization criteria assign points for serving political subdivisions other than the applicant but does not recognize systems that serve additional users that are not political subdivisions, (e.g. irrigation, livestock, steam-electric power generation, manufacturing, or county-other). Region M further commented that to better prioritize diverse urban and rural area projects, the regionalization criteria could be weighted more heavily or the definition of rural could be revised or determined by the regional water planning groups.

Response

If the board’s regionalization definition included every project from a political subdivision that would serve additional non-political subdivision users, even generally understood non-regionalization projects could potentially get points under this category. This is not the intent as the board understands it of the regionalization criteria. However, a project that connects existing systems, even those that fall into the “county-other” category, would be considered a regionalization project. The board defined “rural population” consistent with “rural political subdivision,” as that term was defined by the Legislature. The board made no changes to the rule as a result of this comment.

Comment

NHA commented that the project selection process should include consideration of those projects that provide regionalization and those that serve both urban and rural populations.

Response

The board appreciated the comment. The board believes that the rule accomplishes this result. No changes in the rule have been made as a result of this comment.

§ 363.1304(5) – High Percentage of Water Supply Needs

Comment

LCRA and NTMWD commented that some points (more than zero) should be awarded to applicants where a significant percentage of that applicant's water supply need is met. NTMWD commented that 20% could be a significant percentage. LCRA commented that 25% or higher could be a significant percentage. NTMWD commented that the proposed rule weighs against rapidly growing metropolitan areas, as no single project will meet a majority of such an applicant's water supply needs.

Response

The statute calls for the board to give the highest consideration in awarding points to projects that will have a substantial effect, including projects that will, "meet a high percentage of the water supply needs of the water users to be served by the project." Texas Water Code § 15.437(c)(4). While the board concedes that a project that meets 20% or 25% of the water supply needs of the water users can be a significant project, the board does not believe that 25% would fall into the category of a "high percentage." Therefore, the board declines to change the rule as a result of this comment.

Comment

LCRA commented that assigning some points for the longer term needs, i.e., needs that will be met by the project in later decades than the first decade the project becomes operational, may be appropriate.

Response

The criteria are part of the board's attempt to balance urban versus rural interests and increase the ability of rural projects to achieve enough points to receive financial support and assist the board in fulfilling its statutory duty to undertake to apply not less than 10% for funding to support projects for rural political subdivisions and agricultural water conservation projects. Texas Water Code § 15.434(b)(1). The board did not receive alternative suggestions that would give the board some assurance that rural projects will receive sufficient points in the project prioritization system. The board declines to make any changes to the rule in response to this comment.

Comment

Region M commented that projects that serve users in the county-other category should include the needs of the whole county-other grouping in this calculation. Further, if the project serves

non-municipal water user groups, the county-wide groupings of needs should not be used to calculate the percentage of needs met by a project. Finally, Region M commented that the proposed criteria penalize entities who are developing multiple sources or systems in order to be more resilient in the face of supply shortages.

Response

The proposed criteria were required by the Legislature to be included in the scoring system and to receive the highest consideration in awarding points. Similarly, the Legislature stated that the points would go to projects that meet, “a high percentage of the water supply needs of the water users to be served by the project.” The board will base the calculation on needs in the state water plan, and it is not free to include or exclude other users from the calculation. No changes were made in response to this comment.

§ 363.1304(6) – Additional Points

Comment

Environment Texas, NWF and Sierra Club commented that there appeared to be a typographical error in this section in that a project could also receive additional points under criteria in subsections 11 and 12. Environment Texas suggested that potentially subsection 13 should be included.

Response

The board appreciates this comment. The rule has been changed to reflect that a project can receive additional points under the criteria in subsection 7 through 12. Subsection 13 was not included since that subsection is technically not a criterion for awarding points. It is meant as a tie breaker for project ranking in the event that two or more projects receive the same number of points, and not all of those projects can be funded through the same round of financing. Changes to the rule as described in this response were made.

§ 363.1304(7) – Local Contribution and Leveraging of Funds

Comment

The Comptroller commented that an applicant that had used local monies to fund part of its project might be concerned that it would receive the same consideration as an applicant that was funding part of its project with federal funds. The Comptroller suggested that the rules provide similar points for the criteria of Texas Water Code § 15.437(d)(1) and (d)(3). This would actually favor the applicant using local funds since that applicant would get points both for the criteria under subsection (d)(1) for the local contribution and under (d)(3) for leveraging those local funds.

Response

Increasing the total points either by adding points to a criterion or by splitting a criterion in the rules and giving them the same number of points as the single proposed criterion, unless a similar number of points are reduced somewhere else, has the effect of reducing the weight of all the other criteria. The board was unable to find a category that it felt should have a reduced weight. The board also did not want to create a disincentive for political subdivisions to seek federal or other non-TWDB funds for all or part of the costs of their water infrastructure projects. The board has not made any changes in response to the comment.

Comment

H₂O4Texas, TAB, TWCA, TRWD, and others commented that the allocation of points for local contribution should be on a scale larger than 1 to 5. This would allow a better differentiation between projects that provided 10% funding versus a project that provided 50% funding. A point scale similar to the point scale for water conservation would be appropriate.

Response

The board recognizes the importance of local contributions to a project and leveraging of federal funds for a project; however, if the rule were to increase the total points for this category, there would be a corresponding decrease in the percentage contribution of other categories to the overall point total. The board notes that the proposed rule provides five different gradations of points to differentiate between providing 10% funding versus providing 50% funding. This is similar to the point scale for municipal water conservation where there are five different levels of points for gallons per capita per day reductions of 2 to 18 % or more. The difference between the proposed scale for financial contribution and water conservation is that for water conservation each movement up on the scale results in two points rather than 1 point. The board was unable to find other categories or factors where the board wished to reduce the relative contribution of that category. The board has made no changes to the rule in response to this comment.

Comment

TWCA encouraged the board to count local contributions of related or dependent projects as if the contribution was made directly to the project for which funding is being sought.

Response

The board recognizes that many state water plan projects are interrelated. However, the board believes that it is appropriate to consider only the local contribution to the project, since projects are typically recommended and prioritized as distinct water management strategies by the regional water planning groups. Also, at some level, all local projects are related, so it becomes difficult to draw the line. By having only the local contribution of each project count toward only that project, the board has a bright line with which to deal. No changes to the proposed rule were made in response to this comment.

§ 363.1304(8) – Financial Capability

Comment

LCRA, H₂O4Texas, NTMWD, SJRA, TAB, TRWD, and TWCA commented that the board should consider additional factors for determining financial capacity of the applicant other than, or in addition to, the household cost factor, stating that the calculation proposed would be elusive to projects that serve agriculture or industry. They offer tailoring the scoring criteria to the type of applicant.

Response

In determining the financial capacity of an applicant, the board examines who the ultimate end user of the proposed project would be, as any costs for the project are ultimately on customers or a population whom the applicant serves. In the majority of projects, the end user is a household. In keeping with that basis, the maximum two points a project could receive will be based on what the estimated financial impact will be on the average household in the project area. No changes to the proposed rule were made in response to this comment.

Comment

NTMWD commented that the board should consider other indicators that may demonstrate the applicant's ability to repay. The District proposes the use of the applicant's bond rating as well as overall financial health to determine the ability to repay the SWIFT loans.

Response

The use of bond ratings as factors to determine applicant's ability to repay would place non-rated smaller, rural entities at a disadvantage. No change has been made in response to this comment.

Comment

TCC commented that the board should ensure all applicants are credit worthy and have the ability to repay.

Response

In addition to the financial capability criteria in the prioritization process, all selected applicants seeking financial assistance from SWIFT/SWIRFT will have to satisfy the board's traditional tests for credit worthiness and ability to repay the loan. The board's credit review includes assessing the applicant's financial and managerial capabilities as well as a review of the community's demographics. The board must make a finding that the entity has the financial ability to repay the debt. The financial capability criterion in the prioritization process is for the purpose of ranking submitted applications only. No changes to the proposed rule were made in response to this comment.

Comment

Region M commented that the cost factor should be balanced by criteria on what other strategies are available to the entity. An entity should not be penalized for a costly strategy when that is the only strategy to meet an immediate need.

Response

The board intends to calculate the household cost factor based on current rates and current debt service. Costs of the proposed project will have no effect on this prioritization criterion. The board has made no changes as a result of this comment.

§ 363.1304(9) – Emergency Need

Comment

The Comptroller noted that the proposed rule provided a maximum of four points for emergency projects. The Comptroller asked if the point system provided enough discretion for the board to address water planning projects that may face an emergency situation that arises quickly.

Response

The SWIRFT/SWIFT financial assistance is only available for projects that are included in the state water plan, in accordance with Texas Water Code § 15.472. The state water plan recommends water management strategies for meeting the long-term water needs of Texas. The board's experience with funding emergency water projects is that the best option for financing emergency water projects will be other board financial programs and programs offered by other agencies. For those remaining cases where the water management strategy in the state water plan is the best technical option to meet an emergency need, the board believes that it does have enough discretion to address those financial needs. The board has made no changes in response to this comment.

Comment

Austin commented that the emergency need conditions as laid out in the proposed rules do not specifically reference drought conditions and recommended adding a drought condition factor since the 2017 State Water Plan will have a chapter on drought.

Response

As required by statute, the rule contains the awarding of points if the applicant is included on the Texas Commission on Environmental Quality's list of public water systems that have a water supply that will last less than 180 days without additional rainfall. In the board's experience, most public water systems are on the list because of issues associated with the drought. The board declines to add additional drought criteria. No changes were made in response to this comment.

Comment

NWF and Sierra Club commented that subparagraph (9)(B) should be deleted so that only true emergencies would be addressed. NWF points out that any advancement in the decade of need, even from the fourth decade to the third decade would be characterized and prioritized as an emergency. Sierra Club questioned whether a project in the distant future was an emergency just because it is needed a decade earlier, for example, the decade of need changing from 2060 to 2050.

Response

The board disagrees with the comment. Water planning is carried out on a five-year cycle. If during this cycle, it becomes clear that a project is needed a decade sooner, that is generally because of sudden and unforeseen change in circumstances, not a gradual increasing of need that was unanticipated. Because the process necessary to secure permits for large water supply projects may take a long time, it is sometimes necessary to begin development on a project that will not serve a need for over 10 years. As a result, it is just not projects that move from the second decade of need to the first decade of need that may unexpectedly need to start development immediately. Since the SWIFT/SWIRFT financing is a loan, the board's experience is that the risk that a political subdivision will come in to borrow money before it is necessary is likely low. The board has declined to make any changes in response to this comment.

Comment

Brushy Creek commented that all projects that are recommended for implementation in the first decade of need should get one point for emergency need.

Response

The board believes that many projects recommended in the first planning decade do not address an emergency need, for a number of reasons. For instance, projects that are needed in the first decade may either have simple permit requirements or the project owner has already started the permitting process, and therefore those projects cannot be considered emergencies. Further the board does not want to create an incentive for owners to wait to start their projects in order to receive emergency points. The board has not made any changes to the rule as a result of the comment.

Comment

One individual commented that there were not enough points allocated to emergency need.

Response

The board was unable to find a category of points that it felt it could reduce in order to give this category more points. The board has not made any change to the rule as a result of this comment.

§ 363.1304(10) – Ready to Proceed

Comment

The Comptroller noted that the proposed rule provided points for projects that are ready to proceed within 18 months. The Comptroller questioned whether providing additional points for shorter periods of time, such as 6 months or 12 months, would provide additional incentive for faster construction of these water projects.

Response

The board acknowledges that selecting any timeframe to serve as a yardstick for “ready to proceed” is uncertain and requires a high level of professional judgment. Often, there are permits to be obtained, designs to be completed, or other tasks before a project is ready, making six months unrealistic. Non-pre-design funding option applicants have to prepare design documents during the time from funding to construction, adding to the reasonable length of time to construct. The board does not want to create an incentive for applicants to wait too long to bring an application in for funding. In addition, SWIRFT is a loan program. This provides a built-in incentive for political subdivisions to only apply for financial assistance when they are close to their actual need to use the funds. The board declined to make any changes to the rule.

Comment

H₂O4Texas, TAB, TRWD, and TWCA commented that applicants who had obtained a water right should get more than one point for this activity. Water rights are difficult to obtain. Having the necessary water right is a major obstacle that has been overcome and makes that project closer to construction. TRWD and TWCA suggested that three to five points would be appropriate. TAB would have the board award additional points for obtaining other required permits as well.

Response

The board understands that acquiring a water right can be difficult. The difficulty for the board is in finding categories in the proposed rule where the board thinks it appropriate for that category to receive less weight in project scoring. The board has reexamined this category for projects that are ready to proceed and notes that the proposed rule would award one point for projects where the applicant has secured funding for the project from other sources, § 363.1304(10)(D). This point is a duplication of the points awarded in the local contribution or leveraging federal funds category, § 363.1304(7). Therefore, in the final rule the board has eliminated the point for having secured funding from another source and increased the points for obtaining a water right to two. The board declines to award additional points for obtaining other permits, as the statute declined to require the board to award points for applicants who had obtained other permits. It is difficult to equitably award points to different projects for obtaining required permits when the types of permits and the difficulty in obtaining them varies widely from project to project. The board made changes to the rule as specifically set forth in this response.

Comment

TxWIN commented that the TWDB should further define the types of information necessary that constitutes “readiness to proceed.” It suggested the TWDB consider the criteria set forth in 31 TAC § 363.1307(d)(1) as laid out in the pre-design funding option. TxWIN also commented that additional prioritization points should be awarded for projects that have completed or substantially completed design and that these projects should also be given higher priority in the evaluation process.

Response

The board notes that the tasks set out in § 363.1307(d)(1), such as description of the project, area maps, project budget, and schedule, are tasks that are typically included in preliminary engineering. While there are virtues to more specificity, the board is concerned that given the broad nature of projects that are eligible for SWIRFT funding, from new water supplies to reuse and water conservation projects, all of those tasks might not be applicable to all types of projects. At this point the board wants to maintain flexibility by the use of the general term “preliminary engineering.” While the board considers an applicant’s “readiness to proceed” to be important, the prioritization system is a balancing act in which other criteria are equally, and some more, important. The board could not find a category in which it wanted to reduce the number of points to transfer to projects with completed designs. No changes were made in response to this comment.

§ 363.1304(11) – Water Conservation

Comment

1,535 individuals commended the TWDB for the proposed prioritization weight to be given projects from applicants who have already demonstrated water conservation or whose projects will achieve water conservation. The Nature Conservancy thought the proposed rule was a good way to reward past performance in water conservation and to incentivize future performance.

Response

The board appreciates these comments. No changes were made in response to this comment.

Comment

Representative Lon Burnam, Coastal Bend Sierra Club, League of Independent Voters of Texas, Sierra Club, NWF, Nature Conservancy, Population Media Center, and 8,824 individuals commented that water conservation should be the first priority for funding in each funding cycle. As many individuals pointed out, the water conservation projects would still have to meet other project eligibility criteria.

Response

HB 4 requires the TWDB to establish a point system for prioritizing projects that come to the board for financial assistance from the SWIRFT. The statute requires the board to give the

highest consideration to four factors: projects that will serve a large population; projects that provide assistance to a diverse urban and rural population; projects that provide regionalization; and projects that will meet a high percentage of the water supply needs of the water users served by the project. The statute goes on to provide for the board's consideration of other factors in its prioritization system, including the demonstrated or projected effect of the project on water conservation. The statute did not include water conservation as one of the factors that should be given the highest consideration by the board. The rule adopted today, does give water conservation the most points (along with the priority given by the regional water planning group) among all those factors listed by the statute as deserving consideration by the board, but not in the group required to receive the highest consideration. The board has not made any changes in response to this comment.

Comment

Region M commented that agricultural water conservation projects should be weighed much more heavily. Region M pointed out that many of the other categories are not available to agricultural water conservation projects to receive points. Yet, agricultural water use accounts for a significant portion of the state's water use.

Response

The board notes that if an agricultural water conservation project to improve efficiency results in conserved water available for municipal use, then other categories for ranking projects would become available. The project will be evaluated by the board for prioritization looking at the whole of the project and will, therefore, have to be evaluated on a case-by-case basis. The board acknowledges that with the statutory criteria for prioritization, many agricultural water conservation projects might not score as high as typical municipal projects. However, the board does believe that appropriate water conservation projects will be able to be funded with the prioritization system adopted here. The board intends to apply funding to the percentages for agricultural projects through a very aggressive marketing and outreach program. The board has not made any changes to the rule in response to this comment.

Comment

Region M, Rio Grande Regional Water Authority and one individual provided comments expressing concern for how agricultural water conservation projects will fare in the prioritization process. Region M commented about projects that serve both agricultural and municipal water user groups. Region M commented that points in 31 TAC §§ 363.1304(11)(A) and (11)(B) should apply to both groups. Region M and Rio Grande Regional Water Authority further commented that other categories of prioritization are not available to agricultural conservation projects despite the fact that agricultural use accounts for a significant portion of the state's water. They point out that it will be difficult to compare agricultural water conservation projects to other projects in the prioritization process. Region M comments that this is because there is no capacity to pay in agricultural conservation projects. It recommends that this criterion should be weighted more heavily.

Response

While certain categories of prioritization are not available to agricultural conservation projects because, for example, there may not be a municipal user population to serve, the TWDB is directed in Texas Water Code § 15.434(b) to apply “not less than” 10% of projects for agricultural water conservation. This percentage is intended to be a floor and not a ceiling on the amount the board could disburse. The board is convinced that it will be able to fund eligible agricultural water conservation projects. Simultaneous with the adoption of this rule, the board is developing procedures to solicit applications, methodologies for subsidies and other terms for financial assistance. The board expects these procedures to assist in meeting the agricultural conservation category . No changes to the proposed rules were made in response to this comment.

Comment

ACEC, Austin, NWF, and NTMWD commented on the proposed water conservation criteria that utilize the last 30 years for a historic baseline comparison of gallons per capita per day to the average for the last four years. Comments included that the length of time used to calculate the historic baseline was too long, some entities would benefit from passive conservation savings from efficient plumbing fixture standards, and the current four-year average could include water savings from reduction in use due to drought. NTMWD suggested looking at financial resources devoted toward conservation as an alternative demonstration of water conservation success.

Response

After review, the board is of the opinion that the last twenty years of water use data be considered or, if less than 20 years of data is available, the available data will be considered. Therefore, the rule has been revised to consider 20 years of historic data instead of the proposed 30 years.

Additionally, while the board recognizes weather as one factor impacting water use, it also recognizes that these impacts vary based on myriad of additional factors including but not limited to time of year, demand, and water source. The board is of the opinion that using rolling four-year averages adequately addresses this concern. Changes to the proposed rule were made as more specifically set forth in this comment.

Comment

HCPUA commented that for projects that serve multiple political subdivisions, the scoring system for water conservation should be modified so that municipal water conservation is based on a weighted scoring system. The entity that receives the most water from a proposed project will then have a larger influence on how municipal conservation is scored.

Response

For projects that serve multiple political subdivisions that do not fall into the category of wholesale water systems, the board will base the water conservation scoring on the political subdivisions that will be served by the project. The board declines at this time to specify in rule the method that it will use in these situations. The board would like to gain some experience with

real cases before committing to any one system, so that it avoids any unintended consequences. The board has made no changes in response to this comment.

Comment

Austin commented that alternative criteria should be considered to acknowledge applicants that have achieved and are maintaining desirable gallons per capita per day use that could remain fairly constant over time. Austin's concern is that eventually it can become increasingly difficult and expensive to continue to reduce per capita water use.

Response

The board acknowledges that eventually it will become increasingly difficult to continue to reduce per capita water use. However, the board is of the opinion that at the present time the rule is appropriate. In the near term, cities that have achieved a reduction in per capita water use can receive points under the rule. If the situation changes over time and the board sees that rule changes are warranted, it may initiate rulemaking. As the board and the public gain experience with the rules and the practical implementation of the program, the board will remain open to public input regarding the need for rule changes. No changes to the proposed rule were made in response to this comment.

Comment

Abilene and NTMWD commented that § 363.1304(11)(A) should be amended to use residential gallons per capita per day instead of total gallons per capita per day, since it would provide a more consistent measure of water conservation success given that total gallons per capita per day can vary greatly among municipalities.

Response

It is true that total gallons per capita per day can vary widely between cities because of their relative proportions of residential, commercial, institutional, and industrial water users, among other factors. However, this criterion is only comparing entities to themselves, not to other municipalities. Texas Water Code § 363.15 regarding Required Water Conservation Plans specifically requires, at a minimum, that water conservation plans include quantified targets and goals for municipal use, which includes residential, commercial, industrial, agricultural, institutional, and wholesale water uses. Since water conservation plans must address these uses, the board believes that total gallons per capita per day is the most appropriate criteria to consider regarding the demonstration of water conservation savings. No changes to the proposed rule were made in response to this comment.

Comment

Corpus Christi inquired about the situation of SWIFT funding if subsequent to the loan award the utility is found to not meet the established threshold for water loss. Corpus Christi wants to know the impact on financing, construction, and scheduling.

Response

An applicant will be evaluated against the threshold of water loss at the time of the application. If financing is awarded, the political subdivision will submit their annual audits and the board will evaluate their progress and performance relative to that threshold. If for any reason a political subdivision that had met the threshold at the time of board financing subsequently fails to meet the threshold, the obligation to use board funding to address water loss will not come into play until the next time the political subdivision comes to the board for financial assistance. The board has not made any changes to the rule as a result of this comment.

Comment

NFBWA, NHCRWA, WHCRWA, and SJRA commented that the proposed water conservation criteria do not recognize that wholesale water providers and retail water suppliers are not similarly situated when it comes to scoring for water conservation.

Response

Though the board acknowledges that wholesale water providers and retail water suppliers may not be similarly situated when it comes to scoring for water conservation, the board is of the opinion that it is important to assess the impacts of conservation efforts on the water savings accomplishments of the end user. As such, the board has added a new section to § 363.1304(11) addressing how water conservation criteria will be applied to wholesale applicants. When prioritizing funding of projects under existing TWDB programs, the board uses similar criteria to those outlined herein. The approach entails reviewing historical and current water use data of the wholesale water provider's customer or customers affiliated with the application to determine use figures. The board has added new language to § 363.1304(11) to address water conservation scoring for wholesale water providers. Changes were made to the rule as specifically set forth in this response.

Comment

Region M commented that it would be helpful if the TWDB could establish and make public standards for determining or verifying agricultural efficiency measurements.

Response

The board recognizes the concern for standards to determine and verify agricultural water use efficiency. Applications for projects that make significant water efficiency improvements may involve preliminary estimates of efficiency gains based on sound engineering principles and established best management practices. Individual projects will likely differ substantially in the size, scope, and type of activities proposed, thus making standards appropriate to all types of projects difficult to determine beyond those that are generally accepted in principle and practice. TWDB staff monitors professional literature and stands ready to provide technical assistance to interested potential applicants. The board has not made any changes to the rule as a result of this comment.

Comment

Austin commented that an additional set of criteria should be developed specifically for water conservation and reuse projects to help determine which projects are selected to satisfy the 20% allocation requirement. The additional criteria could include such things as a measure for percent reduction of evaporation losses, for aquifer storage and recovery projects, percent increase in reuse capacity over existing reuse capacity, and existing reuse capacity as a percent of total planned reuse capacity.

Response

The board disagrees with the comment. Under the statute all water conservation and reuse projects will count toward the 20%. The Legislature did not say that only a certain type of water conservation and reuse project will count. Therefore, a separate priority system to differentiate between those projects is unnecessary. The board has made no change in response to this comment.

Comment

Water Smart Software commented that the board should reference the Water Conservation Implementation Task Force's Water Conservation Best Management Practices Guide in the rule. They further commented that the board should add language to the definition of water conservation to emphasize that "water conservation is *proven* practices, techniques, programs, and technologies that will protect water resources, *measurably* reduce water consumption . . ."

Response

The board disagrees with this comment. The definition of water conservation is specific enough to set the boundaries of what will be considered a water conservation project. Reference to a best management practices guide that could become outdated outside of the rulemaking process is inappropriate. While the board understands the benefits of proven and measurable technologies, the board does not want to dis-incentivize innovating and developing technologies that are promising. The board has not made changes to the rule in response to this comment.

Comment

One individual commented that there were not enough points allocated to water conservation.

Response

The board was unable to find a category of points that it felt that it could reduce in order to give this category more points. The board has not made any change to the rule as a result of this comment.

§ 363.1304(12) – Priority Assigned by Regional Water Planning Group

Comment

H₂O4Texas, Region M, and TAB commented that the priorities established by the regional water planning groups should be the highest consideration in the TWDB's prioritization process.

Response

HB 4 requires the TWDB to establish a point system for prioritizing projects that come to the board for financial assistance from the SWIRFT. The statute requires the board to give the highest consideration to four factors: projects that will serve a large population, projects that provide assistance to a diverse urban and rural population, projects that provide regionalization, and projects that will meet a high percentage of the water supply needs of the water users served by the project. The statute goes on to provide for the board's consideration of other factors in its prioritization system, including the priority given the project by the regional water planning group. The statute did not include the regional planning group's priority ranking as one of the factors that should be given the highest consideration by the board. The rule adopted today, does give the priority assigned by the regional water planning group the most points (along with water conservation) among all those factors listed by the statute as deserving consideration by the board, but not in the group required to receive the highest consideration. The board has not made any changes in response to this comment.

Comment

Austin, H₂O4Texas, TAB, TRWD, and TWCA submitted comments about the TWDB's funding cycle in relation to additional local contributions a water plan project may see after the ranking of a region's prioritization occurs. All commented the board should consider allowing "timely adjustments" where a material change would occur to a water plan project's prioritization score as assigned by a regional water planning group. Further, Austin, TRWD, TWCA, and H₂O4Texas commented that the board should consider allowing for updating the regional level project scores originally provided by the regional water planning groups. In their view, significant steps toward implementation might occur between the time the project was originally scored and the time the sponsor applies for funding. That change, they contend, wouldn't be captured in the point scoring associated with the original regional prioritization. TWCA and H₂O4Texas commented that the board should consider awarding point scores to water plan projects that are equal to the highest point score received by any other related or dependent project.

Response

The board agrees that HB 4 places great emphasis on the ranking of water plan projects at the regional water planning level. Texas Water Code § 15.436(c) requires the TWDB to create a stakeholder committee charged with establishing a set of uniform standards for prioritizing water plan projects at the regional level. It is these uniform standards that will address the issue of maintaining appropriate consideration of rankings that occur at the regional level. The board intends with the proposed rules to score projects based on discretely measured end-beneficiaries of each project, which will ensure fair, consistent, and replicable scoring for all projects seeking SWIRFT funding. Larger projects on which other projects depend may already receive higher point scores as a result of the higher total population and volume of water needs of the end users served by these projects. There is no prohibition against the regional water planning groups

rescoring their water management strategies as often as they so choose. The board makes no changes to the proposed rules in response to these comments.

Comment

Region H commented that what is considered a project for the purposes of the regional prioritization process is unclear and the list of projects provided to Region H does not realistically reflect the future water supply needs of the state. Region H also commented about the regional prioritization “template” stating that there is not a mechanism to “screen” projects already implemented; that it does not include provisions for key supply relationships among projects; that it requires scoring of many projects unlikely to need to apply for funding; and creates challenges in consistently and realistically scoring phased infrastructure projects.

Response

Region H is referring to the uniform standards to be applied to prioritizing projects at the regional level developed by the stakeholder committee created by the board in accordance with Texas Water Code § 15.436(c). The uniform standards are the mechanism by which regional water planning groups prioritize and screen water plan projects. Further, it is these uniform standards that will address the issue of maintaining appropriate consideration of rankings that occur at the regional level. Larger projects on which other projects depend may already receive higher point scores as a result of the higher total population and volume of water needs of the high number of end-users served by these projects. The board intends with the final rules to score projects based on discretely measured end-beneficiaries of each project, which will ensure fair, consistent, and replicable scoring for all projects seeking SWIRFT funding. Currently, project scoring allocates 15% of potential points based on regional prioritization. Actual scoring of a specific application will be based upon all relevant facts that weigh into a project’s scoring. No changes to the proposed rules were made in response to this comment.

Comment

Environment Texas commented that the prioritization rules for regional planning group ranking should be amended to account for input from other affected regions. In the situation where a project to benefit one region is to be built in another region that strenuously objects to the project, points under this category should be allocated based on the average of the two groups’ prioritization of that project.

Response

The board disagrees with this comment. The statute provides that the priority system must consider, “the priority given the project by the applicable regional water planning *group* . . .” (emphasis added); not groups. Texas Water Code § 15.437(d)(7). The board understands the legislative intent to be that each regional water planning group would prioritize projects in their plan that meet a water supply need. There is nothing in the legislation to suggest that the board is to integrate one regional water planning group’s prioritization with another group’s objection to render a composite score in the regional planning groups’ prioritization that would then be

incorporated into the final board prioritization. The board has not made any changes to the rule in response to this comment.

Comment

NTMWD commented that the board should revise the rankings awarded by the regional planning groups by removing from consideration those projects within a regional ranking list which are not actual itemized projects. For example, Region C, generally identified “municipal conservation” as a strategy that was scored high in the regional water planning groups’ prioritization. Other regions that did not have many or any “municipal conservation” strategies will have their projects score higher in this criterion.

Response

The board appreciates the comment and understands the concern. However, the board cannot ignore the regional prioritizations or short-circuit the rank order of projects determined under Texas Water Code § 15.437(d)(7). No change has been made to the rule as a result of the comment.

§ 363.1304(13) – Tie Breakers

Comment

Sierra Club and the Nature Conservancy commented that they support using water conservation as a tie breaker.

Response

The board appreciates the comment. No changes have been made to the rule as a result of this comment.

§ 363.1304 Prioritization Criteria – Additional Criteria

Comment

Representative Lon Burnam, Clean Water Action, Environment Texas, Galveston Bay Foundation, National Wildlife Federation, Nature Conservancy, Sierra Club, and 8,789 individuals commented that the board should adopt additional prioritization criteria that would award additional points to projects that have additional positive environmental benefits. Representative Burnam states that HB 4 authorizes this, and its legislative purposes included ecological objectives. Environment Texas further suggested that the point system should also be structured to avoid projects with significant harm to aquatic systems. Environment Texas suggested a multi-objective approach to water creation that maximizes environmental benefits and minimizes adverse impacts to rivers. Environment Texas and numerous individuals pointed out that providing water for instream flows or the use of the Texas Water Trust are vehicles that could be used for ecologically beneficial projects.

Response

HB 4 requires the TWDB to establish a point system for prioritizing projects that come to the board for financial assistance from the SWIRFT. The statute requires the board to give the highest consideration to four factors: projects that will serve a large population, projects that provide assistance to a diverse urban and rural population, projects that provide regionalization, and projects that will meet a high percentage of the water supply needs of the water user groups served by the project. The statute goes on to provide for the board's consideration of seven other factors, several with sub-factors, in its prioritization system. The statute did not include environmental benefits as a factor that the board must consider in prioritizing projects. The board has decided to limit the prioritization system to just the legislatively required factors and to assess the required factors by objective measurements of the criteria. The board is at a loss as to how it would objectively assign point values to quantify environmental benefits.

The board has an alternative mechanism for considering environmental concerns on SWIFT/SWIRFT projects. Before the board's decision to fund a project, the project will undergo an environmental review in which the regulatory agencies can provide comments on the project. The executive administrator prepares a report to the board, which the board considers before the board makes a decision on funding the project.

The board has not made any changes to the rule in response to this comment.

Comment

SAWS commented that reliability of the water supply provided by a project should be addressed in this section in order to achieve the goal of providing an adequate water supply for the future of the state.

Response

TWDB's regional water planning rules and guidelines in 31 TAC Chapter 357 require that regional water planning groups evaluate water management strategies based on several outlined criteria, which include reliability of supply under drought of record conditions. As a result it is unnecessary to add reliability as an additional prioritization criterion in the rule. No changes to the proposed rule were made in response to this comment.

Comment

TPWD commented that the rules should add prioritization criteria that address potential agricultural and natural resource impacts associated with proposed water management strategies. TPWD states that regional water planning groups are required by statute and rule to conduct a quantitative analysis of impacts to agricultural and natural resources associated with proposed water projects, citing Texas Water Code § 16.053 and 31 TAC § 358.4(b)(3) and (6).

Response

Texas Water Code § 16.053 requires the board to approve a regional water plan, "only after it has determined that: . . . the plan is consistent with long term protection of the state's water resources, agricultural resources and natural resources. . ." SWIRFT and SWIFT financial assistance is only for projects that are water management strategies in the state water plan.

Therefore, all qualified projects submitted to the TWDB for prioritization will be water management strategies that the board has already approved after having determined that it is consistent with the long-term protection of agricultural and natural resources. Further, the board has decided to minimize the complexity of the prioritization system by limiting it to just the legislatively required factors. The board has not made any changes to the rule in response to this comment.

Comment

Water Smart Software commented that the prioritization system should incorporate cost-effectiveness criteria. League of Independent Voters of Texas commented that sustainable development should be prioritized.

Response

Sustainability and cost-effectiveness are required elements in the prioritization of projects by regional water planning groups. Texas Water Code § 15.436(a)(4)(5). The ranking of projects by the regional water planning groups is effectively incorporated into the board's prioritization system. Texas Water Code § 15.437(d)(7). The board does not see the need to, in effect, double count sustainability and cost-effectiveness by adding them into the board's scoring. The board has also decided to minimize the complexity of the prioritization system by limiting it to just the legislatively required factors. The board has made no changes in response to this comment.

Comment

Sierra Club and U.S. Capital Advisors commented that it does not believe that at this time additional points need to be added specifically for rural, agricultural irrigation, or reuse projects.

Response

The board acknowledges the comment. No change has been made to the rule as a result of the comment.

Comment

Population Media Center, Texas Drought Project and five individuals commented that reservoirs should not be funded under this program. Two individuals commented that reservoirs should not be funded unless the applicant had maximized water recycling and reuse. One individual commented that innovative recycling should be granted more points than a reservoir project. 6,062 individuals commented that the board should avoid projects that could cause serious damage to our rivers.

Response

The board is very mindful of the role and authority given to it by the Legislature. The Legislature has given the Texas Commission on Environmental Quality (TCEQ) the authority to grant or deny state water right permits. A water right permit is generally required for any surface water project that could be eligible for financial assistance. As part of that permitting process, the TCEQ is required to consider environmental factors before deciding to grant or deny the permit.

Groundwater projects may require a permit from a local groundwater conservation district, which has certain regulatory powers. Many of the water plan projects eligible for SWIFT/SWIRFT funding require federal environmental permits as well. Before the board will fund any project, the project undergoes an environmental review in which the regulatory agencies can provide comments on the project. The executive administrator prepares a report to the board, which the board considers before the board makes a decision on funding any project. That process is the mechanism that the board uses to evaluate environmental issues and concerns prior to funding water projects.

The Legislature required the board to prioritize projects based on specific criteria given in HB 4. That prioritization methodology did not include a prioritization based on a hierarchy of desirable technologies. The various options for meeting future water needs are decided at the regional water planning group level. In order to keep the prioritization method as simple as possible the board has elected to not adopt additional criteria over and above that which the board is directed to consider in the legislation.

The board has not made any changes in response to this comment.

Comment

Population Media Center commented that projects that support efforts to modernize existing pipelines and prevent waste and loss should be given priority over all new construction projects. They further commented that no new construction projects should be funded in any area that has not first taken all efforts toward conservation.

Response

As required by statute, the board can only grant an application for financing if the board finds that at the time of the application the applicant has submitted and implemented a water conservation plan. Texas Water Code § 15.435(g)(1). This provision is implemented in the rule, § 363.1309. Further, under the water loss rules to be adopted by the board shortly, the board is not able to finance a project unless the applicant has water loss less than a threshold set by board rule or the applicant is also taking steps to reduce water loss down to the threshold. Between these provisions, the board is of the opinion that it has adequately addressed the concerns of the commenter. No changes were made in the rule in response to this comment.

Response

§ 363.1305 – Use of Funds

Comment

NFBWA commented that it supports the proposed “Use of Funds,” rule.

Response

The board appreciates the comment. No change was made in the rule in response to this comment.

Comment

LCRA and TRWD commented that the term of the loan be matched to the expected useful life of the facility, which can exceed 30 years, or include 40-year amortizations as now allowed in bond markets.

Response

Statutory limitations require the terms of a loan to not exceed the lesser of the expected useful life of the facility, or 30 years. Water Code §15.435(c)(2). This limitation prevents the removal of the 30 year provision. No change to proposed rule was made in response to this comment.

Comment

TRWD recommends the board seek legislation authorizing the use of 40 year amortizations.

Response

The board's current authorization per §15.435 of the Water Code is the lesser of 30 years or the useful life of the project and the board wishes to have some experience with the program before making legislative policy recommendations regarding the program. No changes to the proposed rule were made in response to this comment.

Comment

Corpus Christi commented that it is unclear whether TWDB has the option of buying down interest rates.

Response

Under Water Code §15.435(c)(1) and the rule, §363.1305(a)(1), the board can use funds from SWIFT to make loans below the board's cost of funds, but not lower than 50 percent of the board's cost of funds. The board believes the rule is sufficiently clear. No changes were made to the rule in response to this comment.

Comment

Upper Trinity Regional Water District commented that they will greatly benefit from the deferral option. City of Houston commented that loan deferral during construction is a huge benefit as long as the payback period is not too short.

Response

The length of the SWIRFT loan deferral will be determined by the board based on the needs of the applicant and the impacts to the long-term viability of the SWIFT/SWIRFT program. The TWDB will provide a range of the subsidies (or minimum subsidy) that will be available for each funding structure under SWIRFT with the solicitation of applications for the initial round of State Water Plan funding. No changes to the proposed rules were made in response to this comment.

Comment

Corpus Christi commented that the TWDB should remain flexible with how the TWDB phases in principal repayment. The TWDB should have some discretion to smooth the shock of a water rate increase or eliminate the need for an increase altogether if the project is a water conservation project.

Response

The board intends to remain flexible regarding the terms of deferral of loan repayments. Each deferral will be negotiated with the applicant on an application by application basis. How the terms of the deferral will effect rate increases will depend on a lot of factors, but any rate increase is a local decision. Whether a rate increase is needed or not will depend on local utility income, existing debt and operating expenses and amounts financed. No changes have been made to the rule in response to the comment.

Comment

The Comptroller noted that the SWIRFT is allowed to refinance projects under Water Code §15.474. The Comptroller asked if the TWDB would consider drafting rules related to refinancing. The Comptroller further asked if refinancings would be scored for priority ranking in the same manner as other projects under the priority rules.

Response

At this time the board has not proposed rules related to refinancings to allow the board the maximum flexibility to deal with those issues on a project by project basis. Refinancings will be scored using the same priority ranking in the same manner as other projects. No changes to the rule have been made in response to this comment.

Comment

LCRA commented that SWIFT loan funds should be allowed to refinance existing debt obligations for approved facilities. LCRA also commented that SWIFT loan funds should be eligible to retire existing debt obligations related to the approved facility.

Response

Currently, statute does not provide for the refinancing of existing debt obligations directly using SWIFT funds. SWIFT funds can be used via a bond enhancement agreement to provide additional security for general obligation bonds or revenue bonds issued by the TWDB to finance or refinance projects included in the state water plan in accordance with Texas Water Code §15.435(b). Refinancing of existing debt obligations may be available under terms specified by the TWDB utilizing SWIRFT funds. Texas Water Code §15.474 states that financial assistance provided from the SWIRFT fund may be used by the TWDB to provide financing or refinancing, under terms specified by the TWDB, for projects included in the state water plan authorized under Subchapters Q or R in Chapter 15; Subchapters E or F in Chapter 16; or Subchapter J in

Chapter 17, including water conservation or reuse projects designed to reduce the need for this state or political subdivisions of this state to develop additional water resources. Section 15.435(e) allows for SWIFT bond enhancement agreements for refunding bonds only if the refunded bond proceeds have been or will be used for state water plan projects. The proposed rules do not prevent the TWDB from utilizing SWIRFT financial assistance to refinance a project nor SWIFT bond enhancement agreements for refunding bonds. Refinancing and refunding will be a policy decision made by the board.

No changes to the proposed rules were made in response to this comment.

Comment

LCRA commented that the board should allow the integration of the scheduled SWIFT loan maturities within the applicant's existing and upcoming scheduled debt portfolio to the extent it reasonably conforms to the applicant's financial goals.

Response

The board is willing to work with applicants' financial goals and make every effort to reasonably accommodate the applicant's preferred schedule of payments to the board. The board does note that it typically pools multiple applications when it seeks its fundings so that necessitates a balancing of the various applicants' interests. This means that these issues have to be worked out on a bond issuance by issuance basis. The board has made no changes to the rule in response to these comments.

Comment

TWCA commented that the rule regarding term and use of funds be amended to allow the use of funds similar to the municipal bond market, such as the ability to do wrap-around funding instead of only level debt.

Response

The board is open to the possibility of structuring wrap-around fundings. Details of this type of financing will have to be worked out on a project by project basis. This is another reason that the board has elected not to write detailed rules on how financing will be structured. No changes to the rules are necessary to accommodate wrap-around fundings. No changes to the rules have been made in response to this comment.

§ 363.1306 – Interest Rates for Loans

Comment

The Comptroller commented that § 363.1306(2)(B) and (C) indicate the executive administrator will reduce the market rate by a subsidy. The Comptroller suggested replacing "will" with "may" in order to give the TWDB additional flexibility.

Response

The board agrees that it should preserve the maximum flexibility to set the terms and conditions of the financing within the bounds of the statute. This flexibility is necessary to have the active financial management of the program so as to carry out the intention of the Legislature under varying market conditions. Under the rule, the board has discretion to set an interest rate subsidy and discretion as to the amount of the subsidy. Once the subsidy is set by the board, the executive administrator has no discretion in applying the subsidy, if any, to the market rate. The rule has been reworded to clarify the board's intent. Changes were made in response to this comment as specifically set forth in this response.

Comment

Upper Trinity Regional Water District and LCRA commented that the interest rates should be set as close to the 50% maximum as reasonably practical. LCRA commented that the TWDB assign interest rates that are fixed for the entire loan term and determine both the term and interest rate within a timeframe at least 60 to 90 days prior to the anticipated closing.

Response

The TWDB will provide a range of the subsidies (or minimum subsidy) that will be available for each funding structure under SWIRFT with the solicitation of applications for the initial round of state water plan funding. The TWDB expects that the terms of the financial assistance provided to applicants will be tailored to best fit the needs of the applicants and to benefit the long-term viability of the fund. The TWDB expects that the terms of the financial assistance will change based on each round of applications. Interest rates on the loans provided to applicants under this program will depend in part on the TWDB's cost of funds as the TWDB issues bonds. Because the interest rate that the bond market charges to the TWDB will vary over time, the interest rate that the TWDB offers political subdivisions will also vary over time. In addition the amounts and types of funding provided to political subdivisions in preceding fundings affect the amounts and types of funding that can be provided to subsequent applicants while still protecting the corpus of the fund and the TWDB's ability to offer financing on attractive terms. The proposed § 363.1306 (relating to Interest Rates on Loans) identifies the timing and general method that the board would use to set the interest rates for SWIFT and SWIRFT project funding and payment deferrals. The proposed § 363.1303(c) indicates that the board will establish the subsidy at the time it approves the prioritization of the abridged applications and 30 days before an applicant would need to submit a complete financial assistance application. No changes to the proposed rules were made in response to these comments.

Comment

LCRA commented interest rates should be provided 90 days before the anticipated closing of the loan and that after 90 days rates should be reconsidered.

Response

The board will work with applicants to provide timely information so that applicants can make their own prudent financial decisions. The board expects to have expedited closings and delivery of funds, minimizing the time between the board obtaining funds and closing and delivery of funds to applicants. No changes to the rule were made in response to the comment.

§ 363.1307 – Pre-design Funding Option

Comment

LCRA and TxWIN commented that entities developing reservoirs should be able to receive a commitment for construction funds prior to completing the planning, permitting, and design of that reservoir. Sierra Club strongly supported the requirement in the proposed rules that applicants must complete planning, permitting, acquisition, and design before receiving a commitment to fund reservoir construction.

Response

The TWDB understands the effort involved and the potential time required for regulatory permitting of reservoir projects. The TWDB believes that it is the agency's fiduciary responsibility to not offer a commitment for construction of a reservoir until a project sponsor has completed this effort, clearly identifying the scope of the project including any mitigation. No changes to the proposed rules were made in response to these comments.

Comment

Sierra Club commented that subsection (c) should be changed to provide that the available information could come from the applicant or other appropriate sources and that “there *appear to be* no significant permitting . . .” should be changed to “there *are* no significant permitting. . .”

Response

The board disagrees with the comment. The proposed rule states that the board action will be based on available information. Where the information can come from is not specified, so under the rule as written, the information can come from other appropriate sources. No change to the rule is necessary in that respect.

This section of the rule relates to the pre-design funding option where an applicant may seek financing for completion of planning, permitting costs, and design for the project. It is during these activities that many environmental issues are first uncovered and alternative designs are developed in an attempt to eliminate or minimize any environmental issues. Failing that, environmental mitigation plans are developed. At this stage of the project it is too early in the process to state *with certainty* that there are, or are not, significant permitting, environmental, engineering, or financial issues. No changes have been made to the rule in response to this comment.

Comment

NWF and Sierra Club commented that in subsection (d)(1), which refers to “known” permitting, social or environmental issues, should be expanded to include “reasonably anticipated” permitting, social, or environmental issues. NWF believes that if an issue is reasonably anticipated, it should be addressed in the application.

Response

At the application for pre-design funding stage of the project, which is addressed by this subsection in the rule, there often is very little information on social or environmental issues available to the applicant. One of the purposes of the pre-design funding is to fund the discovery and addressing of these issues. Addressing social and environmental issues in the pre-design funding application is to put the cart before the horse. No changes were made in the rule in response to the comment.

Comment

NWF and Sierra Club commented that subsection (f) appears to limit the executive administrator to considering only information provided by the applicant in making a report on known or potentially significant social or environmental concerns. NWF suggests that the executive administrator should make use of all “readily available” information in preparing the written report. NWF also notes that that the proposed rule has the executive administrator preparing a report to himself. NWF suggested that the report should go to the board.

Response

The board does not agree that the proposed rule limits the executive administrator to only use the information supplied by the applicant when making the report to the board. The executive administrator also uses other information available in making the report. In order to make its intent clear, the board has modified the rule in response to this comment. The board has also modified the rule to state that the report will go to the board. Changes were made to the proposed rule as specifically set forth in this response.

Comment

Sierra Club commented that this subsection (g) should be expanded to require the executive administrator to also advise the board as to the impacts of those projects on the agricultural, water, and natural resources of the region in which the project is located as identified in the relevant regional water plan or plans and the impact of those projects on political subdivisions, landowners, and the environment if environmentally related special mitigative or precautionary measures are not implemented.

Response

The board disagrees in part with the comment. The regional plan is one source of information available to the executive administrator and routinely will be consulted in the preparation of the report to the board. No change to the rule is necessary to allow the executive administrator to use the regional plans as a source of information. The additional information suggested to be added to the report is too detailed to be provided at the pre-design stage of the project development process. The board has declined to make any changes to the rule in response to the comment.

§ 363.1308 Board Participation Program

Comment

NFBWA and SJRA commented that they support the Board Participation program as proposed. SJRA believes that it will encourage applicants to “right-size” their projects.

Response

The board appreciates the comments. No change was made in response to these comments.

Comment

LCRA commented that § 363.1308(b)(2) appeared to be a typographical error. The reference should be to § 363.1309.

Response

The TWDB appreciates this comment and has corrected the typographical error in the final rule to make the reference to § 363.1309. Changes were made to the proposed rule as specifically set forth in this response.

Comment

TxWIN commented that a specific reference to Texas Government Code § 2269 should be inserted into language of § 363.1308(d), regarding procedures for advertising for bids and selection of a bidder to construct the project.

Response

Section 363.1308(d) requires the TWDB and a financial assistance recipient through SWIRFT funding to execute a master agreement that requires the designated political subdivision to ensure that proper procedures are observed during the bidding process for public notice and construction selection requirements. The TWDB declines to provide a specific reference to a statute since statutes may be amended or moved from one section of the code to another from time to time. No changes to the proposed rules were made in response to this comment.

Comment

TxWIN commented that that the board may want to reconsider the prioritization criteria used for projects ready to proceed, changing it from 18 months to 12 months as proposed in § 363.1304(10) since the prioritization criteria seem to be in conflict with § 363.1308(g)(3).

Response

Section 363.1308 details the procedures by which the TWDB will acquire an ownership interest in a water supply project that a financial assistance recipient will buy back over time. These requirements are similar to the TWDB’s existing state participation program. The proposed rules describe how a proposed purchaser would proceed with acquiring the TWDB’s ownership interest, which could be with local funds or through financial assistance from any other TWDB

funding programs other than Board Participation. The 12-month period of § 363.1308(g)(3) refers to the time period in which any board financial assistance for the acquisition of the ownership interest will be available. This is typically years after the project construction was complete. The 18-month time period of § 363.1304(10) refers to the time between the first application for financial assistance and construction. No changes to the proposed rules were made in response to this comment.

Comment

TWCA and TRWD commented on the administrative cost fee proposed in § 363.1308(h). TWCA's understanding was that the fee only applied to projects seeking state participation. TWCA encourages the board to affirm the interpretation. In addition, it also commented that a cap should be placed on total fees and costs an applicant may be required to pay as a percentage of a funded program under any of the TWDB's programs.

Response

The fee proposed in § 363.1308(h) was for administrative costs associated only with the Board Participation program (known also as State Participation) financed with SWIFT/SWIRFT funds. The board has determined this administrative fee will not be necessary for Board Participation funded through SWIRFT and will delete this provision. Caps on fees in other board programs will have to be addressed in those other programs' rules. Subsection (h) was deleted in response to this comment. Changes were made to the proposed rule as specifically set forth in this response.

§ 363.1310: Action of the Board on Application

Comment

TRWD and TWCA commented that there should be the option to make funds available to the project owner prior to soliciting bids for construction. TRWD commented that all funds should be delivered to the political subdivision on issuance and eliminate the requirement that funds be placed into escrow.

Response

TWDB's existing rules in Chapter 363, Subchapter A, provide for the release of funds that is consistent with the agency's statutory duties and fiduciary responsibilities. The rules provide for the release of construction funds from a project owner's escrow account to the project owner's construction account upon submittal of the necessary bid documents and prior to the project owner issuing the notice to proceed. The project owner will then have access to the funds prior to the start of construction, and the project owner is responsible for managing those construction funds in relation to its contractor schedule. No changes to the proposed rules were made in response to this comment.

Comment

ACEC, Houston, LCRA, NFBWA, NHA, SJRA, TxWIN, Upper Trinity Regional Water District, U.S. Capital Advisors, and WHCRWA submitted comments about segmented funding of water plan projects. Houston, NFBWA, SJRA, Upper Trinity Regional Water District, U.S. Capital Advisors, and WHCRWA commented that they support the flexibility in 31 TAC § 363.1310 to allow for TWDB to commit funds over several years. NFBWA further recommended the inclusion of the preamble discussion related to the multi-year “take-down” schedule in the final rule. However, LCRA commented that a commitment should not be open-ended and recommended specifying the date after which the financial assistance would no longer be available should be at least two years from the date of the approval of the commitment. Similarly, TxWIN commented that the TWDB must be aware that project delays associated with splitting or phasing funding over multiple years could negatively impact construction schedules and costs. TxWIN questioned whether phased funding will still entail the board making a commitment for the entirety of a project.

Response

The board is of the opinion that multi-year take downs are a beneficial option for funding larger projects with high capital costs and longer construction schedules. The board appreciates the support of flexibility in board commitments with a date after which financial assistance will no longer be available. The board believes that the current rule language as proposed is sufficient to allow commitments over multiple years with specific take down amounts each year, and would like to retain flexibility in adjusting the time period. No changes to the proposed rule were made in response to this comment.

§ 363.1311 – Rural and Water Conservation Reporting

Comment

The State Water Implementation Fund for Texas Advisory Committee and NWF commented that the language of § 363.1311(a)(3) and (4) should more closely track the statute. The Advisory Committee points out that Texas Water Code § 15.434(b)(2) does identify agricultural irrigation projects as eligible to count toward the 20% requirement but also requires that these projects be “designed for water conservation or reuse.”

Response

The board appreciates these comments. After reviewing the statute the board has decided that clarification of the rule is in order. The final rule more closely tracks the language of the statute while preserving the distinction between water conservation and reuse. Agricultural irrigation projects can count toward the 20% requirement, but only if the agricultural irrigation project is designed for water conservation or reuse. Changes have been made to the rule as more specifically set forth in this comment.

Comment

Sierra Club recommended that financial assistance to agricultural water conservation projects should not count toward the 10% set-aside unless the project resulted in an actual reduction in the total amount of water used. If the project leads to enhanced water efficiency and that leads to

an expansion of irrigated acreage, then there is no decrease in the volume of water used and that should not be considered conservation for the purpose of meeting the 10% requirement.

Response

The statute requires the board to undertake to apply not less than 10% of project funds to support projects to rural political subdivisions and agricultural water conservation. Texas Water Code § 15.434(b)(1). The statute does not contain the additional qualifier that agricultural water conservation projects result in a reduction of the volume of water used. The board declines to read this extra condition into the language of the statute. No change has been made as a result of this comment.

Comment

The State Water Implementation Fund for Texas Advisory Committee commented that the proposed rule in § 363.1311 provides significant discretion to the board in allocating project costs among various categories identified in Texas Water Code § 15.434(b). The Advisory Committee went on to say that they understood the need for the discretion. The Advisory Committee strongly recommended that the allocations to the various categories be made in a transparent and comprehensible manner and that special attention be paid by the board in implementing this portion of the rule. The Advisory Committee further commented that the board's action so far in implementing HB 4 has been very consistent with those principles.

Response

The board appreciates these comments. In addition to the information required by Texas Water Code § 15.440 to be posted on the board's website relating to projects funded by the program and status of those projects, the board commits to posting information by project as to what portion of the project dollars were allocated to the various categories identified in Texas Water Code § 15.434(b) and an explanation of the allocation. The board has placed language to this effect in the final rule.

Comment

Abilene commented that it supports categorizing pro rata portions of projects that serve rural areas as contributing toward the 10% funding for rural and agricultural water conservation.

Response

The board appreciates the comment. No change was made in response to this comment.

Comment

The Farm Bureau pointed out that both the term "agricultural water conservation" and the term "agricultural irrigation project" are used in HB 4. The Farm Bureau commented that they believe that the Legislature intended any agricultural project that improves water use efficiency or reduces overall water use would qualify under either category, whereas an agricultural project that secured new sources of water would only qualify under "agricultural projects."

Response

The board acknowledges the similarity between the terms, “agricultural water conservation” and “agricultural irrigation project.” As explained above, the board is convinced that the Legislature intended that only agricultural irrigation projects designed for water conservation or reuse could count toward the 20% category. There may be some projects that could fit as either “agricultural water conservation” or as an “agricultural irrigation project.” The board does not believe that the Legislature intended the board to count one project as qualifying for both categories. Therefore, if the situation arises where a single project could fit both the 10% and 20% categories, the board will decide on a case-by-case basis as to the best fit for the project and report the project as counting toward only that category. The board’s decision will be reported on the board’s website and to the elected leadership of the state as required by Texas Water Code § 15.440. No change in the rule has been made in response to this comment.

Comment

NWF and Sierra Club comment that to ensure consistency the language in subsection (c) should be similar to the amended language of subsection (a). NWF and Sierra Club suggested language added to the subsection that limited agricultural water conservation projects to those that resulted in net reductions in total water use, and in the case of brush control projects, save quantifiable amounts of water on a sustainable basis that would otherwise be lost to brushy plants. In the case of agricultural irrigation projects, the NWF and Sierra Club wanted language limited to those agricultural irrigation projects that improve the efficiency of water delivery or application, or that incorporate the use of devices to indicate the amount of water withdrawn, or that achieve reuse.

Response

The board agrees that there should be consistency in the language between subsection (a) and subsection (c). In keeping with the board’s changes to subsection (a), the board has made changes to subsection (c) that closely track the statute by using the statutory phrase “that are designed for water conservation or reuse” to modify the term “agricultural irrigation project.” Changes have been made to the rule as more specifically set forth in this comment.

Comment

Population Media Center commented that water reuse should not count toward the 20% set-aside.

Response

Texas Water Code § 15.434(b)(2) provides that the board shall undertake to apply not less than 20% of funds to water conservation *and reuse*, (emphasis added). The Legislature directed the board that reuse will count toward the 20%; the board does not have discretion to not include reuse projects. The board does understand the legislative intent to be that the 20% is a floor and not a ceiling so that water conservation projects can still be funded even after 20% has been reached. No changes to the rule have been made as a result of this comment.

§ 363.1312: Reporting Requirements Regarding Historically Underutilized Businesses

Comment

TxWIN commented that Texas historically underutilized businesses (HUB) requirements only apply to direct state agency bids and procurements; the Texas HUB requirements do not apply to the SWIFT/SWIRFT program. TxWIN also commented that the issuance of the Certificate of Approval by the executive administrator should not be conditioned upon receiving a report on HUB participation from the political subdivision using SWIFT/SWIRFT funding.

Response

The board understands that HB 4 did not change the scope and application of the Texas HUB program. However, HB 4 did impose a new requirement that the executive administrator provide an annual report to the SWIFT Advisory Committee on *“the participation level of historically underutilized businesses in projects that receive funding related to a bond enhancement agreement under this subchapter”* (emphasis added). Texas Water Code § 15.438(n)(2). A bond enhancement agreement is the mechanism used to create the financial package of SWIFT and SWIRFT funds used to provide financial assistance to a political subdivision under HB 4. Texas Water Code § 15.435. It follows that information on whether a political subdivision used a HUB on a project funded by SWIFT/SWIRFT must be communicated to the executive administrator so that he is able to fulfill the reporting requirements set out in Texas Water Code § 15.438(n)(2).

The rule does not require political subdivisions receiving SWIFT or SWIRFT funding to use HUBs but only to provide information if a HUB is utilized for any of the projects financed with SWIFT/SWIRFT. Placing this requirement in a rule as a condition for a Certificate of Completion puts the political subdivision on notice that this information will be required and ensures that the information will be promptly reported. No changes to the proposed rule were made in response to this comment.

STATUTORY AUTHORITY

The amendments are adopted under the authority of Texas Water Code §6.101, which authorizes the TWDB to adopt rules necessary to carry out the powers and duties of the TWDB.

The amendments affect Texas Water Code, Chapters 15 and 17.

DIVISION 1. INTRODUCTORY PROVISIONS

31 TAC §363.1, §363.2

STATUTORY AUTHORITY

The amendments are proposed under the authority of Texas Water Code §6.101, which authorizes the TWDB to adopt rules necessary to carry out the powers and duties of the TWDB.

The amendments affect Texas Water Code, Chapters 15 and 17.

§363.1.Scope of Subchapter.

This subchapter shall govern the board's programs of financial assistance under the following programs established by the Texas Water Code:

(1) in Chapter 15:

(A) Water Assistance Fund under Subchapter B;

(B) Water Loan Assistance Fund under Subchapter C;

(C) Storage Acquisition Program authorized under Subchapter E;

(D) Colonia Self-Help Program authorized under Subchapter P;

(E) Program for Water and Wastewater Financial Assistance for Disadvantaged Rural Communities authorized under Subchapter O;

(F) Water Infrastructure Fund under Subchapter Q; and

(G) State Water Implementation Fund for Texas and State Water Implementation Revenue Fund for Texas under Subchapter M.

(2) - (5) (No change.)

§363.2.Definitions of Terms.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in the Texas Water Code, Chapter 15, 16 or 17, and not defined here shall have the meanings provided by the appropriate Texas Water Code chapter.

(1) - (22) (No change.)

(23) SWIFT--The state water implementation fund for Texas.

(24) SWIRFT--The state water implementation revenue fund for Texas.

(25) Water Plan--The current state water plan prepared and adopted in accordance with Texas Water Code, §16.051.

DIVISION 3. FORMAL ACTION BY THE BOARD

31 TAC §363.33

STATUTORY AUTHORITY

The amendments are proposed under the authority of Texas Water Code §6.101, which authorizes the TWDB to adopt rules necessary to carry out the powers and duties of the TWDB.

The amendments affect Texas Water Code, Chapters 15 and 17.

§363.33. Interest Rates for Loans and Purchase of Board's Interest in State Participation and Board Participation Projects.

(a) Procedure and method for setting interest rates.

(1) The executive administrator will set interest rates under this section for purchase of the board's interest in state and board participation projects or for loans on a date that is five business days prior to the political subdivision's adoption of the ordinance or resolution authorizing its bonds or drawdown of state participation funds and not more than 45 days before the anticipated closing of the loan or state participation project from the board. After 45 days from the establishment of the interest rate of a loan, rates will be reconsidered, and may be extended only with the approval of the executive administrator.

(2) - (3) (No change.)

(b) Lending and interest rate scale. After each bond sale, or as necessary to meet changing market conditions, the board will set the lending rate scale for loans and the interest rate scale for the purchase of the board's interest in state and board participation projects based upon cost of funds to the board, risk factors of managing the board's loan portfolio, and market rate scales. To calculate the cost of funds, the board will add new bond proceeds to those remaining bond funds that are not currently assigned to schedule loan closings, weighting the funds by dollars and true interest costs of each source. The rate scale shall include the program subsidy, if any. The board will establish separate lending rate scales for tax-exempt and taxable projects from each of the following:

(1) - (3) (No change.)

(4) loans from the Economically Distressed Area Program Account;

(5) if revenue bonds constitute the consideration for the purchase of the board's interest in a state participation project by a political subdivision, the revenue bonds shall bear interest at:

(A) - (B) (No change.)

(C) a different rate as established by the board, where no schedule for the purchase of the board's interest in the project was fixed at the time the board provided funds to participate in the project; and

(6) loans from the SWIRFT.

DIVISION 5. CONSTRUCTION PHASE

31 TAC §363.51

STATUTORY AUTHORITY

The amendments are proposed under the authority of Texas Water Code §6.101, which authorizes the TWDB to adopt rules necessary to carry out the powers and duties of the TWDB.

The amendments affect Texas Water Code, Chapters 15 and 17.

§363.51. Inspection During Construction.

After the construction contract is awarded, the political subdivision shall provide for adequate inspection of the project under the supervision of a registered professional engineer and require the engineer's assurance that the work is being performed in a satisfactory manner in accordance with the approved plans and specifications, other engineering design or permit documents, approved alterations, **and provisions for environmental mitigative measures, and in accordance with sound construction principles and practices.** The executive administrator is authorized to inspect the construction and materials of any project at any time, but such inspection shall never subject the State of Texas to any action for damages. The political subdivision shall take corrective action necessary to complete the project in accordance with approved plans and specifications.

SUBCHAPTER G. SMALL COMMUNITY EMERGENCY LOAN PROGRAM

DIVISION 4. CONSTRUCTION AND POST-CONSTRUCTION PHASE

31 TAC §363.731

STATUTORY AUTHORITY

The amendments are proposed under the authority of Texas Water Code §6.101, which authorizes the TWDB to adopt rules necessary to carry out the powers and duties of the TWDB.

The amendments affect Texas Water Code, Chapters 15 and 17.

§363.731. Inspection During Construction.

After the construction contract is awarded, the political subdivision shall provide for adequate inspection of the project by a registered professional engineer and require the engineer's assurance that the work is being performed in a satisfactory manner in accordance with the approved plans and specifications, other engineering design or permit documents, approved alterations, and provisions for environmental mitigative measures. and in accordance with sound construction principles and practices. The executive administrator is authorized to inspect the construction and materials of any project at any time, but such inspection shall never subject the State of Texas to any action for damages. The political subdivision shall take corrective action as necessary to complete the project in accordance with approved plans and specifications.

SUBCHAPTER I. PILOT PROGRAM FOR WATER AND WASTEWATER LOANS TO RURAL COMMUNITIES

DIVISION 4. CONSTRUCTION AND POST-CONSTRUCTION

31 TAC §§363.951, 363.953, 363.955

STATUTORY AUTHORITY

The amendments are proposed under the authority of Texas Water Code §6.101, which authorizes the TWDB to adopt rules necessary to carry out the powers and duties of the TWDB.

The amendments affect Texas Water Code, Chapters 15 and 17.

§363.951. Construction Contract Requirements.

The rural community shall require in all project construction contracts that:

(1) - (4) (No change.)

(5) payment of the retainage remaining due on completion of the contract shall be made only after:

(A) - (B) (No change.)

(C) certification by the executive administrator that the work to be done under the contract has been completed and performed in a satisfactory manner and in accordance with approved plans and specifications;

(6) no valid approval shall be granted unless the work done under the contract has been completed and performed in a satisfactory manner according to approved plans and specifications; and

(7) (No change.)

§363.953. Inspection of Projects.

[(a)] After a construction contract is awarded, the rural community shall provide for adequate inspection of the project by a registered professional engineer and require the engineer's assurance that the work is being performed in a satisfactory manner in accordance with the approved plans and specifications, other engineering design or permit documents, approved alterations, **and provisions for environmental mitigative measures, and in accordance with sound construction principles and practices.** The executive administrator is authorized to inspect the construction and materials of any project at any time, but such inspection shall never subject the State of Texas to any action for damages. The political subdivision shall take corrective action as necessary to complete the project in accordance with approved plans and specifications.

§363.955. Certificate of Approval.

The executive administrator may consider the following as grounds for refusal to give a certificate of approval for any construction contract:

- (1) failure to construct the project according to the approved plans and specifications; or
- (2) failure to comply with any term of the contract.

**SUBCHAPTER M. STATE WATER IMPLEMENTATION FUND FOR TEXAS AND
STATE WATER IMPLEMENTATION REVENUE FUND FOR TEXAS**

31 TAC §§363.1301 - 363.1312

STATUTORY AUTHORITY

The new sections are proposed under the authority of Texas Water Code §6.101, which authorizes the TWDB to adopt rules necessary to carry out the powers and duties of the TWDB.

The new sections affect Texas Water Code, Chapters 15 and 17.

§363.1301. Scope of Subchapter M.

This subchapter shall govern the board's programs of financial assistance under the following programs established by the Texas Water Code, Chapter 15, Subchapters G and H. Unless in conflict with the provisions of this subchapter, the provisions of Subchapter A of this chapter (relating to General Provisions) shall apply to projects under this subchapter.

§363.1302.Definition of Terms.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

- (1) Agricultural water conservation--Those practices, techniques or technologies used in agriculture, as defined in Texas Agriculture Code, which will improve the efficiency of the use of water and further water conservation ~~or reuse~~ in the state, including but not limited to those programs or projects defined in Texas Water Code §§17.871 - 17.912.
- (2) Agricultural irrigation project--Those projects which improve water delivery or application efficiency on agricultural lands, or involve purchase and installation on agricultural public or private property of new water sources, new irrigation systems, or devices designed to indicate the amount of water withdrawn for agricultural irrigation purposes.
- (3) Alternate facility--A construction project that would be necessary to serve the excess capacity of the area to be served by the facility in the event that the facility was not initially constructed to meet the excess capacity.
- (4) Commission--The Texas Commission on Environmental Quality or its successor.
- (5) Entity--A political subdivision or nonprofit water supply or sewer service corporation.
- (6) Excess capacity--The difference between the foreseeable needs of the area to be served by the useful life of the facility and the existing needs for the area to be served by the facility.
- (7) Executive administrator--The executive administrator of the board or a designated representative.
- (8) Existing needs--Maximum capacity necessary for service to the area receiving service from the facility for current population and including the service necessary to serve the estimated population in the area ten years from the date of the application.
- (9) Facility--A regional facility for which an application has been submitted requesting board participation and that includes sufficient capacity to serve the existing needs of the applicant and excess capacity.
- (10) Historically Underutilized Business--The meaning assigned by Government Code §2161.001, and the regulations adopted pursuant thereto.
- (11) Household Cost Factor--The average annual cost of service per household divided by the median household income.
- (12) Nonprofit water supply or sewer service corporation--A water or sewer service corporation operating under Texas Water Code, Chapter 67.

(13) Political subdivision--Includes a city, county, district or authority created under the Texas Constitution Article III, Section 52, or Article XVI, Section 59, any other political subdivision of the state, any interstate compact commission to which the state is a party, and any nonprofit water supply corporation created and operating under Texas Water Code, Chapter 67.

(14) Reuse--The **beneficial** use of groundwater or surface water that has already been beneficially used.

(15) Rural political subdivision--A nonprofit water supply or sewer service corporation, district, or municipality with a service area of 10,000 or less in population based upon the most current data available from the U.S. Bureau of the Census or board-approved projections, or that otherwise qualifies for financing from a federal agency; or a county in which no urban political subdivision exceeds 50,000 in population based upon the most current data available from the U.S. Bureau of the Census or board-approved projections.

(16) Rural population--Residents of a rural political subdivision.

(17) Urban population--Residents of a political subdivision with a population of more than 10,000 individuals based upon the most current data available from the U.S. Bureau of the Census or board-approved projections.

(18) Water conservation--Those practices, techniques, programs, and technologies that will protect water resources, reduce the consumption of water, reduce the loss or waste of water, **or** improve the efficiency in the use of water, **or increase the recycling and reuse of water** so that a water supply is made available for future or alternative uses.

(19) Water plan project--A project that is a recommended water management strategy in the current board-adopted state water plan.

(20) Water supply need--Projected water demands in excess of existing supply as identified in the state water plan.

§363.1303.Prioritization System.

(a) The board will establish deadlines for application submittals. The executive administrator will provide the prioritization of those applications to the board for approval as soon thereafter as practicable. To be considered for prioritization, an applicant must provide adequate information to establish that the applicant qualifies for funding, to describe the project comprehensively, and to establish the cost of the project, as well as any other information requested by the executive administrator. The executive administrator will develop and provide an abridged application to gather information necessary for prioritization. If an applicant submits an abridged application for prioritization purposes, the applicant must submit a complete application to the board within 30 days after the board meeting at which the applicant's project received priority for funding, or the project will lose its priority ranking and the board may commit to other projects consistent with the prioritization.

(b) For each application that the executive administrator has determined has adequate information for prioritization purposes and prior to each board meeting at which applications may be considered for prioritization, the executive administrator shall:

(1) prioritize the applications by the criteria identified in §363.1304 of this title (relating to Prioritization Criteria); and

(2) provide to the board a prioritized list of all complete applications as recommended by the executive administrator, the amount of funds requested and the priority of each application received.

(c) The board will identify the amount of funds available from SWIFT and SWIRFT for new applications by category, establish the structure of financing and the terms of any subsidy, and will consider applications according to §363.1304 of this title. The board reserves the right to limit the amount of funding available to an individual entity.

§363.1304.Prioritization Criteria.

The executive administrator will prioritize applications based on the following point system:

(1) Projects will be evaluated on the criteria provided in paragraphs (2) - (5) of this section. The points awarded for paragraphs (2) –(5) of this section shall be the lesser of the sum of the points for paragraph (2) – (5), or 50 points. ~~for paragraphs (2) – (5) of this section will be summed up to a maximum score for these criteria of 50 points.~~

(2) Either stand-alone projects or projects in conjunction with other recommended water management strategies relying on the same volume of water that the project relies on, in accordance with Chapter 357 of this title (relating to Regional Water Planning), that will serve in total when the project water supply volume is fully operational:

Projects that either directly, or in conjunction with other recommended water management strategies in accordance with Chapter 357 of this title (relating to Regional Water Planning), will serve, in total, when the project water supply volume is fully operational:

(A) at least 10,000 population, but not more than 249,999 population, 6 points; or

(B) at least 250,000 population, but not more than 499,999 population, 12 points; or

(C) at least 500,000 population, but not more than 749,999 population, 18 points; or

(D) at least 750,000 population, but not more than 999,999 population, 24 points; or

(E) at least 1,000,000 population, 30 points; or

(F) less than 10,000 population, zero points.

(3) Projects that will serve a diverse urban and rural population:

(A) serves one or more urban populations and one rural population, 10 points; and

(B) for each additional rural population served, 4 points up to a maximum of 30 points; or

(C) serves only an urban population, or only a rural population, zero points.

(4) As specified in the application, projects which provide regionalization:

(A) serves additional entities other than the applicant, 5 point per each political subdivision served for a maximum of 30 points; or

(B) serves only applicant, zero points.

(5) Projects that meet a high percentage of the water supply needs of the water users to be served calculated from those served and needs that will be met during the first decade the project becomes operational, based on state water plan data:

(A) at least 50 percent of needs met, 10 points; or

(B) at least 75 percent of needs met, 20 points; or

(C) at least 100 percent of needs met, 30 points; or

(D) less than 50 percent of needs met, zero points.

(6) Projects will receive additional points of the project's score on each of the criteria of paragraphs (7) - ~~(12)~~ ~~(10)~~ of this section.

(7) Local contribution to be made to implement the project, including federal funding, and including up-front capital, such as funds already invested in the project or cash on hand and/or in-kind services to be invested in the project, provided that points will not be given for a prior loan through the ~~board~~ ~~Board~~ that included a loan forgiveness component:

(A) other funding at least 10 percent, but not more than 19 percent, of total project cost, 1 point; or

(B) other funding at least 20 percent, but not more than 29 percent, of total project cost, 2 points; or

(C) other funding at least 30 percent, but not more than 39 percent, of total project cost, 3 points; or

(D) other funding at least 40 percent, **but not more than 49 percent**, of total project cost, 4 points; or

(E) other funding at least 50 percent of total project cost, 5 points; or

(F) other funding less than 10 percent of total project cost, zero points.

(8) Financial capacity of the applicant to repay the financial assistance provided:

(A) applicant's household cost factor is less than or equal to 1 percent, 2 points; or

(B) applicant's household cost factor is greater than 1 percent but not more than 2 percent, 1 point; or

(C) applicant's household cost factor is greater than 2 percent, zero points.

(9) Projects which address an emergency need:

(A) applicant, or entity to be served by the project, is included on the list maintained by the Commission of local public water systems that have a water supply that will last less than 180 days without additional rainfall, or is otherwise affected by a Commission emergency order, and drought contingency plan has been implemented by the applicant or entity to be served, 3 points; plus

(B) water supply need is anticipated to occur in an earlier decade than identified in the most recent state water plan, 1 point; plus

(C) applicant has used or applied for federal funding for emergency, 1 point; or

(D) none of the above, zero points.

(10) Projects which are ready to proceed:

(A) preliminary planning and/or design work (30 percent of project total) has been completed or is not required for the project, 3 points; plus

(B) applicant is able to begin implementing or constructing the project within 18 months of application deadline, 3 points; plus

(C) applicant has acquired all water rights associated with the project or no water rights are required for the project, **2 + points point; or plus**

(D) **none of the above, zero points. applicant has secured funding for the project from other sources, 1 point; or**

(E) none of the above, zero points.

(11) Entities that have demonstrated water conservation or projects which will achieve water conservation, including preventing the loss of water:

(A) for municipal projects, applicant has already demonstrated significant water conservation savings, as determined by comparing the highest rolling four-year average total gallons per capita per day within the last twenty thirty years to the average total gallons per capita per day for the most recent four-year period based on board water use data; or significant water conservation savings will be achieved by implementing the proposed project, as determined by comparing the conservation to be achieved by the project with the average total gallons per capita per day for most recent four-year period:

- (i) 2 to 5.9 percent total gallons per capita per day reduction, 2 points; or
- (ii) 6 to 9.9 percent total gallons per capita per day reduction, 4 points; or
- (iii) 10 to 13.9 percent total gallons per capita per day reduction, 6 points; or
- (iv) 14 to 17.9 percent total gallons per capita per day reduction, 8 points; or
- (v) 18 percent or greater total gallons per capita per day reduction, 10 points; or
- (vi) Less than 2 percent total gallons per capita per day reduction, zero points.

(B) for municipal projects, applicant has achieved the water loss threshold established by §358.6 of this title (relating to Water Loss Audits), as demonstrated by most recently submitted water loss audit:

- (i) less than the threshold, 5 points; or
- (ii) at or above the threshold, zero points.

(C) for wholesale water providers, applicant has already demonstrated significant water conservation savings, as determined by comparing the highest rolling four-year average total gallons per capita per day within the last twenty years to the average total gallons per capita per day for the most recent four-year period based on board water use data for customers affiliated with the application; or significant water conservation savings will be achieved by implementing the proposed project, as determined by comparing the conservation to be achieved by the project with the average total gallons per capita per day for the most recent four-year period for customers affiliated with the application.

- (i) 2 to 5.9 percent total gallons per capita per day reduction, 2 points; or
- (ii) 6 to 9.9 percent total gallons per capita per day reduction, 4 points; or

(iii) 10 to 13.9 percent total gallons per capita per day reduction, 6 points; or

(iv) 14 to 17.9 percent total gallons per capita per day reduction, 8 points; or

(v) 18 percent or greater total gallons per capita per day reduction, 10 points; or

(vi) Less than 2 percent total gallons per capita per day reduction, zero points.

~~(E)~~ **(D)** for agricultural projects, significant water efficiency improvements will be achieved by implementing the proposed project, as determined by the projected percent improvement:

(i) 1 to 1.9 percent increase in water use efficiency, 1 point; or

(ii) 2 to 5.9 percent increase in water use efficiency, 3 points; or

(iii) 6 to 9.9 percent increase in water use efficiency, 6 points; or

(iv) 10 to 13.9 percent increase in water use efficiency, 9 points; or

(v) 14 to 17.9 percent increase in water use efficiency, 12 points; or

(vi) 18 percent or greater increase in water use efficiency, 15 points; or

(vii) less than 1 percent increase in water use efficiency, zero points.

(12) Priority assigned by the applicable regional water planning group within the project sponsor's primary planning region:

(A) top 80 **to top 61** percent of regional project ranking, 3 points; or

(B) top 60 **to top 41** percent of regional project ranking, 6 points; or

(C) top 40 **to top 21** percent of regional project ranking, 9 points; or

(D) top 20 **to top 11** percent of regional project ranking, 12 points; or

(E) top 10 percent of regional project ranking, 15 points; or

(F) less than 80 percent of regional project ranking, zero points.

(13) If two or more projects receive the same priority ranking, priority will be assigned based on the relative score(s) from paragraph (11) of this section. If after considering the relative scores of the projects based on the criteria of paragraph (11) of this section, then priority will be assigned based on the relative score(s) from paragraph (9) of this section.

§363.1305. Use of Funds.

(a) The board may use the funds for financial assistance to political subdivisions as follows:

(1) to make loans at or below market interest rates, but not lower than 50 percent of the board's market rate;

(2) to make loans with terms not to exceed the lesser of:

(A) the expected useful life of the **project assets facility**; or

(B) 30 years;

(3) to defer loan repayments, including deferral of principal and interest or accrued interest under criteria developed by the board;

(4) to make loans with incremental repurchase terms for an acquired facility, including terms for no initial repurchase payment followed by progressively increasing incremental levels of interest payment, repurchase of principal and interest, and ultimate repurchase of the entire state interest in the facility using simple interest calculations; or

(5) a combination of the financing outlined in paragraphs (1) - (4) of this subsection.

(b) The board may make funding available under subsection (a) of this section only for implementation of water plan projects.

§363.1306. Interest Rates for Loans.

For loans from the SWIFT and SWIRFT, the following procedures will be used to set interest rates.

(1) The executive administrator will set interest rates under this section for loans on a date that is at least five business days prior to the political subdivision's anticipated adoption of the ordinance or resolution authorizing its bonds and not more than 45 days before the anticipated closing of the loan from the board. After 45 days from the establishment of the interest rate of a loan, rates will be reconsidered, and may be extended only with the approval of the executive administrator.

(2) For loans from the fund, the executive administrator will set the interest rates in accordance with the following:

(A) To the extent that the source of funding is provided from bond proceeds, the lending rate scale(s) will be determined as provided under §363.33(b) of this title (relating to Interest Rates for Loans and Purchase of Board's Interest in State Participation Projects).

(B) The loan interest rate will be determined based on a debt service schedule acceptable to the executive administrator. The executive administrator will identify the appropriate scale for the borrower and identify the market rate for the maturity due in each year. **The board may set an interest rate subsidy.** The executive administrator will reduce the market rate by a subsidy **as to be** determined by the board and thereby identify a proposed loan interest rate for each maturity. The proposed loan interest rate will be applied to the proposed principal repayment schedule. In no instance shall the subsidy determined by the board exceed 50 percent of the market rate.

(C) For loans made under §363.1305(a)(4) of this subchapter (relating to Use of Funds), which receive deferred principal and interest payments, the executive administrator will identify the appropriate scale for the borrower and identify the market rate for the maturity due in each year. **The board may set an interest rate subsidy.** The executive administrator will reduce the market rate by a subsidy **as to be** determined by the board and thereby identify a proposed loan interest rate for each maturity. The proposed loan interest rate will be applied to the proposed principal repayment schedule.

§363.1307.Pre-design Funding Option.

(a) This loan application option will provide an eligible applicant that meets all applicable board requirements an alternative to secure a commitment and close a loan for the pre-design, design or construction costs associated with funding of a project under §363.1305 of this subchapter (relating to Use of Funds). Under this option, a loan may be closed and funds necessary to complete planning and design activities released. If planning requirements have not been satisfied, design and construction funds will be held or escrowed and released in the sequence described in this section. Following completion of planning activities and environmental assessment, the executive administrator may require the applicant to make changes in order to proceed with the project. If the portion of a project associated with funds in escrow cannot proceed, the loan recipient shall use the escrowed funds to redeem bonds purchased by the board in inverse order of maturity.

(b) Reservoir projects are eligible for a board commitment to fund planning, permitting, acquisition, and design costs under this option. Applicants for reservoir construction funds must complete planning, permitting, acquisition, and design before receiving a commitment to fund reservoir construction costs.

(c) The executive administrator may recommend to the board the use of this section if, based on available information, there appear to be no significant permitting, environmental, engineering, or financial issues associated with the project. An application for pre-design funding may be considered by the board despite a negative recommendation from the executive administrator.

(d) Applications for pre-design funding must include the following information:

(1) for loans including construction cost, preliminary engineering feasibility data which will include at minimum: a description and purpose of the project; area maps or drawings as necessary to fully locate the project area(s); a proposed project schedule; estimated project costs

and budget including sources of funds; current and future populations and projected water needs and sources; and a discussion of known permitting, social or environmental issues which may affect the alternatives considered and the implementation of the proposed project;

(2) contracts for engineering services;

(3) evidence that an approved water conservation plan will be adopted prior to the release of loan funds;

(4) all information required in §363.12 of this chapter (relating to General, Legal and Fiscal Information); and

(5) any additional information the executive administrator may request to complete evaluation of the application.

(e) After board commitment and completion of all closing and release prerequisites as specified in §363.42 of this chapter (relating to Loan Closing) and §363.43 of this chapter (relating to Release of Funds), funds will be released in the following sequence:

(1) for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase;

(2) for acquisition and design costs, after receipt of executed contracts for the design phase and upon approval of an engineering feasibility report as specified in §363.13 of this chapter (relating to Preliminary Engineering Feasibility Data) and compliance with §363.14 of this chapter (relating to Environmental Assessment); and

(3) for construction costs, after issuance of any applicable permits, and after bid documents are approved and executed construction documents are contingently awarded.

(f) The executive administrator will use preliminary environmental data provided by the applicant, as specified in subsection (d) of this section, together with information available to the executive administrator, and make a written report to the board executive administrator on known or potential significant social or environmental concerns.

(g) The executive administrator will advise the board concerning projects that involve major economic or administrative impacts to the applicant resulting from environmentally related special mitigative or precautionary measures from an environmental assessment under §363.14 of this chapter.

§363.1308. Board Participation Program.

(a) Board Participation. Unless otherwise directed by legislation, the board will only use the SWIFT or SWIRFT to provide financial assistance for all or a part of the cost to construct the excess capacity of a water plan project where:

(1) at least 20 percent of the total facility capacity of the proposed project will serve existing need; or

(2) the applicant will finance at least 20 percent of the total project cost from sources other than Board Participation from the SWIFT and SWIRFT.

(b) Application for Assistance. In addition to the information required in §363.12 of this chapter (relating to General, Legal, and Fiscal Information) and §363.1307 of this subchapter (relating to Pre-design Funding Option) and any other information that may be required by the executive administrator or the board, the applicant shall provide:

(1) a proposed schedule for purchase of the board's interest in the project;

(2) information to demonstrate the findings required in ~~§363.1309~~ §363.1310(b) of this subchapter (relating to ~~Findings Required~~ ~~Action of the Board on Application~~);

(3) if payment under the master agreement is based either wholly or in part from revenues of contracts with others, a copy of any actual or proposed contracts under which applicant's gross income is expected to accrue. Prior to release of funds, an applicant shall submit executed copies of such contracts to the executive administrator; and

(4) if an election is required by law to authorize participation in the project, the executive administrator may require applicant to provide the election date and election results as to each proposition necessary for the participation of the applicant as part of the application.

(c) Determination. The board may provide funding for board participation from SWIFT and SWIRFT when the information available to the board is sufficient for the board to determine that:

(1) it is reasonable to expect that the state will recover its investment in the facility based upon a determination that the revenue to be generated by the projected number of customers served by the facility will be sufficient to purchase the excess capacity owned by the state;

(2) the estimated cost of the facility as set forth in the application exceeds the current financing capabilities of the area to be served by the facility based on a ~~review of determination that~~ the existing rates of the applicant available for payment of the facility collected from the number of connections at the end of construction and other revenues available for payment of the facility;

(3) the optimum regional development cannot be reasonably financed by local interests based on an assessment of the estimated cost to construct the alternate facility and the revenue to be generated by the projected number of customers of the facility;

(4) the public interest will be served by acquisition of the facility based on a determination that the cost of the facility to the public is reduced by the ~~board's~~ ~~state's~~ participation in the facility; and

(5) the facility to be constructed or reconstructed contemplates the optimum regional development which is reasonably required under all existing circumstances of the site based on a determination that design capacity of the components of the facility are sufficient to meet the foreseeable needs of the area over the useful life of the facility.

(d) Master Agreement. The board and the political subdivision shall enter into and execute a master agreement the text of which shall include, but not be limited to, the responsibilities, duties, and liabilities of each party, including the responsibility of a designated political subdivision to assure that proper procedures are observed in advertising for bids and selecting a bidder to construct the project; the board's cost of acquisition; procedures for disbursement of board funds for the project; recognition of a political subdivision's right of first refusal prior to any sale of the board's interest in the project; a non-competitive clause; a schedule for purchase of the board's interest in the project by the political subdivision; and any other provisions deemed appropriate and necessary by the board.

(e) Construction. On projects to be constructed or enlarged by a political subdivision or subdivisions, one political subdivision may be designated under an agreement with the board to act as manager for the project and perform the functions customarily performed by a manager-owner.

(f) Disbursement of State Funds. State funds expended for the acquisition and/or development of facilities in a project shall be disbursed in accordance with the provisions of the master agreement and any other contracts by the board pursuant thereto.

(g) Acquisition of Board's Ownership Interest.

(1) A prospective political subdivision purchaser of the board's ownership interest in a facility or of the use of such board interest other than under terms specified in the master agreement shall submit an application in the form and number prescribed by the executive administrator. The executive administrator may request any additional information needed to evaluate the application, and may return any incomplete application.

(2) Upon receipt of an application by a prospective purchaser of the board's ownership interest in a facility or use of the facility, the board will send notice of its receipt by regular United States mail to all co-owners of the facility, and any users of the facility or water from the facility.

(3) The application shall be scheduled on the board's agenda, and representatives of the prospective purchaser and other interested parties shall be notified of the time of the meeting. At the conclusion of the meeting to consider the project, the board may resolve to approve, disapprove, approve with conditions, or continue consideration of the application. A commitment will include a date after which the financial assistance will no longer be available. That date shall be the end of that month which is twelve months from the month of board commitment.

(4) If the board approves the application, a transfer resolution will be adopted which shall prescribe the terms and conditions necessary for the sale, transfer, or lease, if such terms have not been specified in the master agreement between the board and political subdivision.

(5) Before the board's adoption of the transfer resolution, the executive administrator shall negotiate a transfer agreement with the prospective purchaser regarding the sale, transfer, or lease of board-owned interests. The transfer agreement shall include the interest transferred, the character of the interest transferred, the formula used to compute the price to be paid for the facilities to be acquired, provisions governing lease or rental of facilities, a hold harmless clause, recognition of the right of first refusal of any of the participating political subdivisions, a clause stating the conditions under which the contract may be terminated, and other provisions appropriate to the subject of the transfer agreement including provisions setting standards for operation and maintenance of the project. The attorney general of Texas shall approve as to legality any contract authorized under this subchapter.

(h) Administrative Cost Recovery for Board Participation Program.

(1) General. The board will assess fees for the purpose of recovering administrative costs from all political subdivisions with which the board agrees to participate under this section.

(2) Payment Method. Payment of one third of the fee is due at closing. The balance of the fee may be paid in a limited number of annual installments with the consent of the executive administrator. The fee may not be included in the total amount of financial assistance provided by the board.

§363.1309.Findings Required.

(a) The executive administrator shall submit the application for financing under this subchapter to the board with comments concerning financial assistance. The application will be scheduled on the agenda for board consideration at the earliest practical date. The applicant and other interested parties known to the board shall be notified on the time and place of such meeting.

(b) The board shall grant the application only if the board finds that at the time the application for financial assistance was made that:

(1) the applicant has submitted and implemented a water conservation plan in accordance with Texas Water Code §11.1271;

(2) the applicant satisfactorily completed a request by the executive administrator or a regional water planning group for information relevant to the project for which the financial assistance is sought, including a water infrastructure financing survey under Texas Water Code §16.053(q); and

(3) the applicant has acknowledged its legal obligation to comply with any applicable requirements of federal law relating to contracting with disadvantaged business enterprises, and any applicable state law relating to contracting with historically underutilized businesses.

§363.1310.Action of the Board on Application.

At the conclusion of the meeting to consider the project for financing under this subchapter, the board may resolve to approve, disapprove, approve with conditions, including requiring the applicant to retain professional project management assistance, or continue consideration of the application. A commitment will include a date after which the financial assistance will no longer be available.

§363.1311.Rural and Water Conservation Reporting.

(a) After the loan closing of a project and release of funds to the political subdivision, the executive administrator shall determine what portion of the project funds, if any, qualify as funding for:

(1) rural political subdivisions;

(2) agricultural water conservation;

(3) water conservation, including agricultural irrigation projects designed for water conservation; or

(4) reuse, including agricultural irrigation projects designed for reuse.

(b) For project costs that cannot be assigned to either a qualifying category and non-qualifying portions of the project, the executive administrator will allocate costs proportionately.

(c) The executive administrator will include in the biennial report to the Legislature required by Texas Water Code §15.440, the percentage of SWIFT and SWIRFT funds used to support rural political subdivisions and agricultural water conservation, and the percentage of SWIFT and SWIRFT funds used to support water conservation or reuse, including agricultural irrigation projects, that are designed for water conservation or reuse, ~~or reuse projects~~. The executive administrator will post this information on the board's internet website along with an explanation for the allocation.

§363.1312.Reporting Requirements Regarding Historically Underutilized Businesses.

The political subdivision receiving financial assistance from the board shall report to the executive administrator the amounts of project funds, if any, which were used to compensate historically underutilized businesses that worked on the project. The executive administrator shall not issue a certificate of approval on a project until this report has been received.

31 TAC §353.3

The Texas Water Development Board (board or TWDB) adopts an amendment to 31 TAC §353.3, relating to Board Meetings, to ensure consistency with recent statutory amendments made to Chapter 6, Texas Water Code, relating to the TWDB. The proposal is adopted without changes as published in the July 11, 2014, issue of the *Texas Register* (39 TexReg 5304).

DISCUSSION OF THE ADOPTED AMENDMENT

The TWDB adopts the amendment to the existing rule related to Board Meetings. The amendment is necessary because the 83rd Legislature passed House Bill 4, the first article of which made changes to the administration of the TWDB. More specifically, §1.06 of the bill amended Texas Water Code §6.060 (relating to Board Meetings) to delete the requirement that the board meet at least once every other month and to provide that the board shall hold regular meetings and special meetings at times and places that the board decides are appropriate. The statute also deleted the office of the vice-chairman of the board and provided that the chairman may designate another board member to act for the chairman in the chairman's absence.

SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENT.

Adopted Amendment to 31 TAC Chapter 353, Subchapter A (relating to General Provisions).

The adopted amendment to §353.3 (relating to Board Meetings), deletes the requirement that the board meet at least once every other month; provides that the board may hold special meetings at the times and places that the board decides are appropriate; provides that the chairman or the board member acting for the chairman shall give the other members reasonable notice of the special board meeting; and provides that the chairman may designate another board member to act for the chairman in the chairman's absence.

REGULATORY ANALYSIS

The board has reviewed the adopted rulemaking pursuant to Texas Government Code § 2001.0225, which requires a regulatory analysis of major environmental rules. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The board is required to conduct a regulatory impacts analysis of a major environmental rule when the result of the adopted rulemaking is to exceed a standard set by federal law, unless the adopted rulemaking is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government implementing a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law.

The specific intent of the adopted rulemaking is to implement new, state statutory requirements imposed by HB 4 on the TWDB to change requirements for meetings and to eliminate the office of vice-chairman and to provide that the chairman may designate another board member to act for the chairman in the chairman's absence. The board has determined that the adopted rulemaking does not meet the definition of "major environmental rule" under that section; therefore, no regulatory impacts analysis of the adopted rulemaking is required. No comments were received by the board on the draft regulatory impacts analysis.

TAKINGS IMPACT ASSESSMENT

The board has determined that the promulgation and enforcement of this adopted rule constitutes neither a statutory nor a constitutional taking of private real property. The adopted rule does not adversely affect a landowner's rights in private real property, in whole or in part, because the adopted rule does not burden or restrict or limit the owner's right to or use of property. The specific intent of the adopted rulemaking is to implement new state statutory requirements imposed by HB 4 on the TWDB to change requirements for meetings and to eliminate the office of vice-chairman and to provide that the chairman may designate another board member to act for the chairman in the chairman's absence. The adopted rulemaking would substantially advance this purpose by amending 31 TAC Chapter 363 to incorporate new statutory requirements. Therefore, the rulemaking does not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution.

PUBLIC COMMENTS

No comments were received on the proposed rulemaking.

STATUTORY AUTHORITY

The amendment is adopted under authority of Texas Water Code §6.101, which authorizes the TWDB to adopt rules necessary to carry out the powers and duties of the TWDB.

The amendment affects Texas Water Code, Chapter 6.

31 TAC §356.10

The Texas Water Development Board (board or TWDB) adopts an amendment to 31 TAC §356.10, relating to Definitions, to ensure consistency with recent statutory amendments made to Chapter 6, Texas Water Code, relating to the TWDB. The proposal is adopted without changes as published in the July 11, 2014, issue of the *Texas Register* (39 TexReg 5305).

DISCUSSION OF THE ADOPTED AMENDMENT

The TWDB adopts the amendment to the existing rules related to Definitions. The amendment is necessary because the 83rd Legislature passed House Bill 4, the first article of which made changes to the administration of the TWDB. More specifically Section 1.01 of the bill amended Texas Water Code §6.052 (relating to Members of the Board; Appointment) to change the composition of the governing body of the agency from six members to three members. The former rule, which is amended by this adopted rule, refers to the governing body of the TWDB as having six members.

SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENT

Adopted Amendment to 31 TAC Chapter 356, Subchapter A (relating to Definitions)

The adopted amendment to §356.10 (relating to Definitions), amends the definition of "Board," for purposes of Chapter 356 (relating to Groundwater Management) by deleting any reference to the number of board members serving as the governing body of the state agency, the Texas Water Development Board. The amendment is necessary because the 83rd Legislature passed House Bill 4 which amended Texas Water Code §6.052 (relating to Members of the Board; Appointment) to change the composition of the board from six members to three members. The adopted amendment would implement this legislative change.

REGULATORY ANALYSIS

The board has reviewed the adopted rulemaking pursuant to Texas Government Code § 2001.0225, which requires a regulatory analysis of major environmental rules. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The board is required to conduct a regulatory impacts analysis of a major environmental rule when the result of the adopted rulemaking is to exceed a standard set by federal law, unless the adopted rulemaking is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal

government implementing a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law.

The specific intent of the adopted rulemaking is to implement new, state statutory requirements imposed by HB 4 on the TWDB to change the composition of the governing body from six to three members. The board has determined that the adopted rulemaking does not meet the definition of "major environmental rule" under that section; therefore, no regulatory impacts analysis of the adopted rulemaking is required. No comments were received by the board on the draft regulatory impacts analysis.

TAKINGS IMPACT ASSESSMENT

The board has determined that the promulgation and enforcement of this adopted rule constitutes neither a statutory nor a constitutional taking of private real property. The adopted rule does not adversely affect a landowner's rights in private real property, in whole or in part, because the adopted rule does not burden or restrict or limit the owner's right to or use of property. The specific intent of the adopted rulemaking is to implement new state statutory requirements imposed by HB 4 on the TWDB to change the composition of the governing body from six to three members. The adopted rulemaking would substantially advance this purpose by amending 31 TAC Chapter 363 to incorporate new statutory requirements. Therefore, the rulemaking does not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution.

PUBLIC COMMENTS

No comments were received on the proposed rulemaking.

STATUTORY AUTHORITY

The amendment is adopted under authority of Texas Water Code §6.101, which authorizes the TWDB to adopt rules necessary to carry out the powers and duties of the TWDB.

The amendment affects Texas Water Code, Chapter 36.

31 TAC §367.2

The Texas Water Development Board (board or TWDB) adopts an amendment to 31 TAC §367.2, relating to Definitions, to ensure consistency with recent statutory amendments made to Chapter 6, Texas Water Code, relating to the TWDB. The proposal is adopted without changes as published in the July 11, 2014, issue of the *Texas Register* (39 TexReg 5319).

DISCUSSION OF THE ADOPTED AMENDMENT

The amendment is necessary because the 83rd Legislature passed House Bill 4, the first article of which made changes to the administration of the TWDB. More specifically Section 1.01 of the bill amended Texas Water Code §6.052 (relating to Members of the Board; Appointment) to change the composition of the board from six members to three members. The former rule, which is amended by this adopted rule, refers to the governing body of the TWDB as having six members.

SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENT

Adopted Amendment to 31 TAC Chapter 367.2, (relating to Definitions)

The adopted amendment to §367.2 (relating to Definitions) amends the definition of "Board," for purposes of Chapter 367 (relating to Agricultural Water Conservation Program) by deleting any reference to the number of board members serving as the governing body of the state agency, the Texas Water Development Board. The amendment is necessary because the 83rd Legislature passed House Bill 4 which amended Texas Water Code §6.052 (relating to Members of the Board; Appointment) to change the composition of the governing body of the agency from six members to three members. The adopted amendment would implement this legislative change.

REGULATORY ANALYSIS

The board has reviewed the adopted rulemaking pursuant to Texas Government Code § 2001.0225, which requires a regulatory analysis of major environmental rules. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The board is required to conduct a regulatory impacts analysis of a major environmental rule when the result of the adopted rulemaking is to exceed a standard set by federal law, unless the adopted rulemaking is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government implementing a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law.

The specific intent of the adopted rulemaking is to implement new, state statutory requirements imposed by HB 4 on the TWDB to change the composition of the governing body from six to three members. The board has determined that the adopted rulemaking does not meet the definition of "major environmental rule" under that section; therefore, no regulatory impacts analysis of the adopted rulemaking is required. No comments were received by the board on the draft regulatory impacts analysis.

TAKINGS IMPACT ASSESSMENT

The board has determined that the promulgation and enforcement of this adopted rule constitutes neither a statutory nor a constitutional taking of private real property. The adopted rule does not adversely affect a landowner's rights in private real property, in whole or in part, because the adopted rule does not burden or restrict or limit the owner's right to or use of property. The specific intent of the adopted rulemaking is to implement new state statutory requirements imposed by HB 4 on the TWDB to change the composition of the governing body from six to three members. The adopted rulemaking would substantially advance this purpose by amending 31 TAC Chapter 363 to incorporate new statutory requirements. Therefore, the rulemaking does not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution.

PUBLIC COMMENTS

No comments were received on the proposed rule.

STATUTORY AUTHORITY

The amendment is adopted under authority of Texas Water Code §6.101, which authorizes the TWDB to adopt rules necessary to carry out the powers and duties of the TWDB.

The amendment affects Texas Water Code, Chapter 17, Subchapter J.